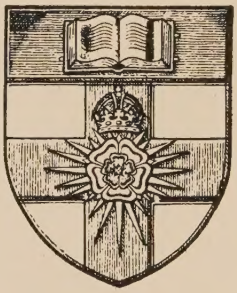
THIS BOOK
MUST NOT BE REMOVED
FROM THE LIBRARY

UNIVERSITY OF LONDON LIBRARY

346·4 McNorth



UNIVERSITY OF LONDON
LIBRARY

Digitized by the Internet Archive
in 2026

https://archive.org/details/law-reports-chancery-division_1893_1

1893.

THE

LAW REPORTS

OF THE INCORPORATED COUNCIL OF LAW REPORTING.

Supreme Court of Judicature.

CASES DETERMINED IN THE

CHANCERY DIVISION

AND IN

LUNACY,

AND ON APPEAL THEREFROM IN THE

COURT OF APPEAL.

EDITOR—G. W. HEMMING, Q.C.

REPORTERS.

Court of Appeal	H. CADMAN JONES, MARTIN WARE, W. WORSLEY KNOX, G. I. FOSTER COOKE,	*Barristers-at-Law.*
Mr. Justice Chitty	GEORGE MURRAY, W. COWELL DAVIES,	*Barristers-at-Law.*
Mr. Justice North	W. LLOYD CABELL, D. PITCAIRN,	*Barristers-at-Law.*
Mr. Justice Stirling	W. WORSLEY KNOX, G. A. STREETEN,	*Barristers-at-Law.*
Mr. Justice Kekewich	G. I. FOSTER COOKE, C. C. M. DALE,	*Barristers-at-Law.*
Mr. Justice Romer	H. L. FRASER, FRANK EVANS,	*Barristers-at-Law.*
Mr. Justice Vaughan Williams (COMPANY CASES).	FRANK EVANS,	*Barrister-at-Law.*
Mr. Justice Wright.	H. BAIRD HEMMING,	*Barrister-at-Law.*

1893.—VOL. I.

LONDON:
Printed and Published for the Council of Law Reporting
BY WILLIAM CLOWES AND SONS, LIMITED,
DUKE STREET, STAMFORD STREET; AND 14, CHARING CROSS.
PUBLISHING OFFICE, 27, FLEET STREET, E.C.

BIBL. LONDIN. UNIV.

Lord Herschell,	*Lord Chancellor.*
Lord Halsbury,	*ex-Lord Chancellor.*
Lord Esher,	*Master of the Rolls.*
Sir Nathaniel Lindley,	
Sir C. S. C. Bowen,	*Lords Justices of the Court of Appeal.*
Sir Henry C. Lopes,	
Sir E. E. Kay,	
Sir A. L. Smith,	
Sir J. W. Chitty,	
Sir Ford North,	*Justices of High Court, attached to Chancery Division.*
Sir James Stirling,	
Sir Arthur Kekewich,	
Sir Robert Romer,	
Sir Roland Vaughan Williams	*Attached to Chancery Division for Company Cases.*
Sir R. S. Wright,	*Attached to Chancery Division.*
Sir Charles Russell,	*Attorney-General.*
Sir John Rigby,	*Solicitor-General.*

ERRATUM.

Page	*For*	*Read*
742 last line	time	trial.

The Mode of Citation of the Volumes in the LAW REPORTS, commencing January 2, 1893, will be as follows:—

In the First Series,
[1893] 1 Ch. [1893] 2 Ch. [1893] 3 Ch.

In the Second Series,
[1893] 1 Q. B. [1893] 2 Q. B. [1893] P.

In the Third Series,
[1893] A. C.

A TABLE

OF THE

NAMES OF THE CASES REPORTED

IN THIS VOLUME.

PAGE

A.

Abbott, *In re.* Peacock *v.* Frigout 54
Adams, *In re.* Adams *v.* Adams 329
——— *v.* Adams. *In re* Adams 329
Allday and Birmingham and District Land Company, *In re* 342
Attorney-General *v.* Moore – 676

B.

Badcock *v.* Cumberland Gap Park Company – – – 362
Bagot, Perkins *v.* *In re* Perkins 283
Baring, *In re.* Jeune *v.* Baring 61
———, Jeune *v.* *In re* Baring– 61
Barker, Collins *v.* – – – 578
Barry Railway Company, Jackson *v.*– – – (C.A.) 238
Beddoe, *In re.* Downes *v.* Cottam (C.A.) 547
Bidwell Brothers, *In re* – – 603
Birmingham and District Land Company and Allday, *In re* – 342
Booth, Roberts *v.* – – – 52
Bourne, *In re.* Martin *v.* Martin 188
Bradbury *v.* Wild – – – 377
Bridger, *In re.* Brompton Hospital for Consumption *v.* Lewis 44
Broad's Patent Night Light Company, Fowler *v.* – – 724
Brompton Hospital for Consumption *v.* Lewis. *In re* Bridger – – – – 44

C.

Carlyle Press, Strong *v.* (C.A.) 268
Cathcart, *In re* – (C.A.) 466
Chambers, *Ex parte* – – 47
Champion, *In re.* Dudley *v.* Champion – – (C.A.) 101
———, Dudley *v.* *In re* Champion – – (C.A.) 101

PAGE

Christie *v.* Davey – – – 316
Clowes, *In re* – – (C.A.) 214
Colchester Tramways Company, *In re* – – – – – 309
Collins *v.* Barker – – – 578
Corporation of the Sons of the Clergy and Skinner – – 178
Cottam, Downes *v.* *In re* Beddoe – – – (C.A.) 547
Crossley *v.* Magniac – – 594
Cumberland Gap Park Company, Badcock *v.* – – – – 362

D.

Davey, Christie *v.* – – – 316
David *v.* Sabin – (C.A.) 523
Denver Hotel Company, *In re* (C.A.) 495
De Teissier *v.* De Teissier. *In re* De Teissier's Settled Estates. *In re* De Teissier's Trusts – 153
De Teissier's Settled Estates, *In re*. *In re* De Teissier's Trusts. De Teissier *v.* De Teissier – – – – 153
Doody, *In re*. Fisher *v.* Doody. Hibbert *v.* Lloyd– (C.A.) 129
———, Fisher *v.* *In re* Doody. Hibbert *v.* Lloyd– (C.A.) 129
Dowling, Hunter *v.* – – 391
Downes *v.* Cottam. *In re* Beddoe (C.A.) 547
Dudley *v.* Champion. *In re* Champion – – (C.A.) 101

E.

Ecclesiastical Commissioners for England *v.* Treemer – – 166
Edwards *v.* Standard Rolling Stock Syndicate – – – 574
Evans, *In re*. Evans *v.* Noton (C.A.) 252
———, Lamb *v.* – (C.A.) 218
———, London and North Western Railway Company *v.* (C.A.) 16
——— *v.* Noton. *In re* Evans (C.A.) 252

PAGE

F.

Field (J. C. & J.), Limited, Schauer *v.* – – – – 35
Fisher *v.* Doody. *In re* Doody. Hibbert *v.* Lloyd– (C.A.) 129
Fitz *v.* Iles – – (C.A.) 77
Fowler *v.* Broad's Patent Night Light Company – – – 724
Fox, Teague *v.* *In re* Godden– 292
Frigout, Peacock *v.* *In re* Abbott 54
Frowde *v.* Hengler. *In re* Hengler – – – – 586
Furnivall *v.* Hudson – – 335

G.

Gibbon and Kidd's Contract, *In re* – – – – – 695
Gillow, Harvey *v.* *In re* Sir E. Harvey's Estate – – – 567
Godden, *In re*. Teague *v.* Fox– 292
Governors of the Charity for the relief of the Poor Widows and Children of Clergymen (commonly called the Corporation of the Sons of the Clergy) and Skinner – – 178
Great Western Railway Company, Ruabon Brick and Terra Cotta Company *v.* (C.A.) 427
Gurney, *In re*. Mason *v.* Mercer 590

H.

Halifax Joint Stock Banking Company, Learoyd *v.* – – 686
Harvey *v.* Gillow. *In re* Sir E. Harvey's Estate – – – 567
Harvey's (Sir E.) Estate, *In re*. Harvey *v.* Gillow – – 567
Hengler, *In re*. Frowde *v.* Hengler – – – – 586
———, Frowde *v.* *In re* Hengler – – – – 586
Hibbert *v.* Lloyd. *In re* Doody. Fisher *v.* Doody – (C.A.) 129
Hill (Viscount), Poulett (Earl) *v.* – – – (C.A.) 277
Hoyle, *In re*. Hoyle *v.* Hoyle (C.A.) 84

PAGE

Hoyle *v.* Hoyle. *In re* Hoyle (C.A.) 84
Hudson, Furnivall *v.* – – 335
Hunter *v.* Dowling – – – 391

I.

Iles, Fitz *v.* – – (C.A.) 77
Ingham, *In re.* Jones *v.* Ingham 352
———, Jones *v.* *In re* Ingham 352
International Company of Mexico, Mercantile Investment and General Trust Company *v.* – (C.A.) 484, n.

J.

Jackson *v.* Barry Railway Company – – – (C.A.) 238
Jenkins, Williams *v.* – – 700
Jeune *v.* Baring. *In re* Baring 61
Jobson *v.* Palmer – – – 71
Jones *v.* Ingham. *In re* Ingham 352
——— *v.* Morgan. *In re* Page – 304

K.

Kidd and Gibbon's Contract, *In re* – – – – – 695

L.

Lamb *v.* Evans – (C.A.) 218
Laxon & Co. (3), *In re* – – 210
Learoyd *v.* Halifax Joint Stock Banking Company – – 686
Lewis, Brompton Hospital for Consumption *v.* *In re* Bridger 44
Lloyd, Hibbert *v.* *In re* Doody. Fisher *v.* Doody – (C.A.) 129
London and North Western Railway Company *v.* Evans (C.A.) 16
London and Provincial Bank, Powell *v.* – – – – 610
Loughnan, Morley *v.* – – 736

M.

McGrath (Infants), *In re* (C.A.) 143
Magniac, Crossley *v.* – – 594
Mahon, *In re* – – (C.A.) 507
Martin *v.* Martin. *In re* Bourne 188
Mason *v.* Mercer. *In re* Gurney 590

PAGE

Maxim Nordenfelt Guns and Ammunition Company *v.* Nordenfelt – – (C.A.) 630
Mercantile Investment and General Trust Company *v.* International Company of Mexico – – (C.A.) 484, n.
Mercer, Mason *v.* *In re* Gurney 590
Moore, Attorney-General *v.* – 676
Morgan, Jones *v.* *In re* Page – 304
Morley *v.* Loughnan – – 736
Mutual Tontine Westminster Chambers Association, Ryan *v.* – – – (C.A.) 116

N.

New York Exchange Company, *In re* – – – – – 371
New Zealand Trust and Loan Company, *In re* – (C.A.) 403
Nordenfelt, Maxim Nordenfelt Guns and Ammunition Company *v.* – – (C.A.) 630
Northumberland (Duke of) *v.* Percy – – – – 298
Noton, *In re.* Evans *v.* Noton (C.A.) 252

O.

Onward Building Society *v.* Smithson – – (C.A.) 1
Ottos Kopje Diamond Mines, Limited, *In re* – (C.A.) 618

P.

Page, *In re.* Jones *v.* Morgan – 304
Palmer, Jobson *v.* – – – 71
Peacock *v.* Frigout. *In re* Abbott 54
Peck, Scholey *v.* – – – 709
Percy, Northumberland (Duke of) *v.* – – – – – 298
Perkins, *In re.* Perkins *v.* Bagot 283
——— *v.* Bagot. *In re* Perkins 283
Pioneers of Mashonaland Syndicate, *In re* – – – – 731
Poulett (Earl) *v.* Hill (Viscount) (C.A.) 277
Powell *v.* London and Provincial Bank – – – – – 610

PAGE

R.

Real Estates Company, *In re* – 398
Roberts *v.* Booth – – – 52
Ruabon Brick and Terra Cotta Company *v.* Great Western Railway Company (C.A.) 427
Ryan *v.* Mutual Tontine Westminster Chambers Association (C.A.) 116

S.

Sabin, David *v.* – (C.A.) 523
Schauer *v.* J. C. & J. Field, Limited – – – – 35
Scholey *v.* Peck – – – 709
Shew & Co., Skinner & Co. *v.* (C.A.) 413
Skinner and Governors of the Charity for the relief of the Poor Widows and Children of Clergymen (commonly called the Corporation of the Sons of the Clergy) – – 178
Skinner & Co. *v.* Shew & Co. (C.A.) 413
Smithson, Onward Building Society *v.* – – (C.A.) 1
Sneath *v.* Valley Gold, Limited (C.A.) 477
Standard Rolling Stock Syndicate, Edwards *v.* – – – 574
Strong *v.* Carlyle Press (C.A.) 268

T.

Teague *v.* Fox. *In re* Godden – 292
Treemer, Ecclesiastical Commissioners for England *v.* – 166
Tucker *v.* Vowles – – – 195

V.

Valley Gold, Limited, Sneath *v.* (C.A.) 477
Vowles, Tucker *v.* – – – 195

W.

West Cumberland Iron and Steel Company, *In re* – – – 713
Wild, Bradbury *v.* – – – 377
Williams *v.* Jenkins – – 700

TABLE OF CASES CITED.

A.

		PAGE
Abernethy *v.* Hutchinson	3 L. J. (O.S.) (Ch.) 209	230
Agar-Ellis, In re	10 Ch. D. 49; 24 Ch. D. 317	149
Agricultural Hotel Company, In re	[1891] 1 Ch. 396	503
Ainslie *v.* Harcourt	28 Beav. 313	63
Aird's Estate, In re	12 Ch. D. 291	89
Airey *v.* Bower	12 App. Cas. 263	216
Alabama, New Orleans, Texas, and Pacific Junction Railway Company, In re	[1891] 1 Ch. 213	485
Alexander *v.* Alexander	2 Ves. Sen. 640	286
Allcard *v.* Skinner	36 Ch. D. 145	748
Allen *v.* Jarvis	Law Rep. 4 Ch. 616	131
Allsopp *v.* Wheatcroft	Law Rep. 15 Eq. 59	640
Ancketill's Estate, In re	27 L. R. Ir. 331	294
Anderson *v.* Bank of British Columbia	2 Ch. D. 644	688
Andrews *v.* Salt	Law Rep. 8 Ch. 622	149
Angelo, In re	5 De G. & Sm. 278	406
Archer *v.* Marsh	6 A. & E. 959	656
Ashbury Railway Carriage and Iron Company *v.* Riche	Law Rep. 7 H. L. 653	638
Atherton, In re	W. N. (1891) 85	702
Atkyns *v.* Kinnier	4 Ex. 776	658
Audley Hall Cotton Spinning Company, In re	Law Rep. 6 Eq. 245	373
Avery *v.* Langford	Kay, 663	640

B.

Badische Anilin und Soda Fabrik *v.* Schott	[1892] 3 Ch. 447	640
Bahia and San Francisco Railway Company, In re	Law Rep. 3 Q. B. 584	618
Bailes *v.* Sunderland Equitable Industrial Society	55 L. T. (N.S.) 808	381
Bailey *v.* Sweeting	9 C. B. (N.S.) 843	99
Baines *v.* Geary	35 Ch. D. 154	639
Ball *v.* Ray	Law Rep. 8 Ch. 467	323
Barber, Ex parte	Law Rep. 5 Ch. 687	394
Barkworth *v.* Young	4 Drew. 1	94
Barnard, Ex parte	[1892] 3 Ch. 307	211
Barnes *v.* Crowe	1 Ves. 486; 4 Bro. C. C. 2	109
Barrett *v.* Day	43 Ch. D. 435	416
Barrow Hæmatite Steel Company, In re	39 Ch. D. 582	503
Beard *v.* Westcott	5 B. & Al. 801; T. & R. 25	57
Beauchamp (Earl) *v.* Winn	Law Rep. 6 H. L. 223	106
Beavan *v.* Beavan	24 Ch. D. 649, n.	586

		PAGE
Beckford *v.* Parnecott	Cro. Eliz. 493	109
Beddow *v.* Beddow	9 Ch. D. 89	243
Bell *v.* Love	10 Q. B. D. 547	30
Bell's Estate, In re	Law Rep. 9 Eq. 172	254
Benfieldside Local Board *v.* Consett Iron Company	3 Ex. D. 54	21
Benhar Coal Company *v.* Turnbull	10 Court Sess. Cas., 4th Series, 558	717
Bertram Luipaard's Vlei Gold Mining Company, In re	[1892] 3 Ch. 332	210
Bishop *v.* Balkis Consolidated Company	25 Q. B. D. 512	624
Blackburn *v.* Mason	Times, May 18, 1892	598
Blackett *v.* Bates	Law Rep. 1 Ch. 124	128
Blacksmith's Case, The	29 Eliz.	647
Blackwood *v.* Chartered Bank of Australia	Law Rep. 5 P. C. 92	614
Bolton, Re	36 Sol. J. 608	89
Bonomi *v.* Backhouse	E. B. & E. 622	446
Bostock *v.* Floyer	Law Rep. 1 Eq. 26	74
Bosworth *v.* Hearne	Andr. 91	658
Bothamley *v.* Sherson	Law Rep. 20 Eq. 304	191
Bowen *v.* Barlow	Law Rep. 8 Ch. 171	215
Bowes *v.* Law	Law Rep. 9 Eq. 636	201
Bradford Tramways Company, In re	4 Ch. D. 18	313
Brandon *v.* Aston	2 Y. & C. Ch. 30	331
Brett *v.* East India and London Shipping Company	2 H. & M. 404	121
Bridges *v.* Garrett	Law Rep. 5 C. P. 451	594
Briggs *v.* Jones	Law Rep. 10 Eq. 92	357
Britannia Building Society, In re	65 L. T. (N.S.) 196	383
Britton *v.* Cole	1 Salk. 359	680
Broad *v.* Jollyfe	Cro. Jac. 596	652
Broder *v.* Saillard	2 Ch. D. 692	323
Broughton *v.* Broughton	5 D. M. & G. 160	133
Browne *v.* Hammond	Joh. 210	567
Browning *v.* Sabin	5 Ch. D. 511	257
——— *v.* Wright	2 Bos. & P. 13	530
Brownlie *v.* Russell	8 App. Cas. 235	381
Buckle *v.* Fredericks	44 Ch. D. 244	77
——— *v.* Lordonny	56 L. J. (Ch.) 437	381
Bunn *v.* Guy	4 East, 190	655
Burnett *v.* Tak	45 L. T. (N.S.) 743	419
Burton's Will, In re	[1892] 2 Ch. 38	329

C.

Caledonian Railway Company *v.* Sprot	2 Macq. 449	22
Callow *v.* Young	56 L. J. (Ch.) 690; 55 L. T. (N.S.) 543	257
Caloric Engine and Siren Fog Signals Company, In re	52 L. T. (N.S.) 846	603
Calvert *v.* Godfrey	6 Beav. 97	163
Canham *v.* Jones	2 V. & B. 218	237
Capron *v.* Capron	Law Rep. 17 Eq. 288	46
Cawley & Co., In re	42 Ch. D. 209	629
Charles *v.* Jones	33 Ch. D. 80	547
Charlton *v.* Charlton	49 L. T. (N.S.) 267	711
Chennell, In re	8 Ch. D. 492	550
Chesman *v.* Nainby	2 Ld. Raym. 1456, 4th ed. by Bayley	652

		PAGE
Chesterfield's (Earl of) Trusts, In re	24 Ch. D. 643	295, 586
Chillington Iron Company, In re	29 Ch. D. 159	607
Christophers *v.* White	10 Beav. 523	132
Church *v.* Brown	15 Ves. 258	532
Clack *v.* Carlon	7 Jur. (N.S) 441; 30 L. J. (Ch.) 639	133, 134
Clarke, In re	21 Ch. D. 817	145
——— *v.* Earnshaw	Gow. 30	74
Clerke *v.* Comer	Cas. t. Hardw. 53	652
Coe *v.* Clay	5 Bing. 440	170
Coggs *v.* Bernard	1 Sm. L. C., 9th ed. pp. 201, 216	73
Colgate *v.* Bacheler	Cro. Eliz. 872	654
Collins *v.* Castle	36 Ch. D. 243	201, 351
——— *v.* Locke	4 App. Cas. 674	654
Combined Weighing and Advertising Company *v.* Automatic Weighing Machine Company	42 Ch. D. 665	416
Consett Waterworks Company *v.* Ritson	22 Q. B. D. 318, 702	21
Conway *v.* Fenton	40 Ch. D. 512	153
Cook *v.* Wright	1 B. & S. 559	485
Cooper, In re	20 Ch. D. 611	358
——— & Allen's Contract, In re	4 Ch. D. 802	697
——— *v.* Trewby	28 Beav. 194	697
Cormack *v.* Beisly	3 De G. & J. 157	374
Corpus Christi College *v.* Rogers	49 L. J. (Ex.) 4	170
Corsellis, In re	34 Ch. D. 675	131
Cotton, In re	1 Ch. D. 232	330
Coventry *v.* Barclay	3 D. J. & S. 320	394
Coupé Company *v.* Maddick	[1891] 2 Q. B. 413	73
Courtier, In re	34 Ch. D. 136	61
Cox *v.* Bennett	Law Rep. 6 Eq. 422	216
—— *v.* Cox	Law Rep. 8 Eq. 343	294
Cradock *v.* Piper	1 Mac. & G. 664	129
Crawshay, In re	43 Ch. D. 615	287
Cripps *v.* Hartnoll	4 B. & S. 414; 32 L. J. (Q.B.) 381	88
Croft, In re	[1892] 1 Ch. 652	188
Cuthbertson *v.* Irving	4 H. & N. 742; 6 H. & N. 135	4, 10

D.

Dalton *v.* Angus	6 App. Cas. 740	446
Daubeny *v.* Cockburn	1 Mer. 626	287
Davenport's Case	8 Rep. 144 b	533
David Lloyd & Co., In re	6 Ch. D. 339	273, 720
Davies, In re	21 Q. B. D. 236	257
——— *v.* Davies	36 Ch. D. 359	636
Davis *v.* Galmoye	39 Ch. D. 322	257
——— *v.* Mason	5 T. R. 118	655
——— *v.* Treharne	6 App. Cas. 460	30, 432
Dent *v.* Bennett	4 My. & Cr. 269	749
—— *v.* Dent	30 Beav. 363	160
Derry *v.* Peek	14 App. Cas. 337	628
Diamond Fuel Company, In re	13 Ch. D. 400	732
Dickson, In re	29 Ch. D. 331	331
Direct Spanish Telegraph Company, In re	34 Ch. D. 307	503

		PAGE
Dixon *v.* Caledonian and Glasgow and South Western Railway Companies	5 App. Cas. 820	444
Dodds *v.* Hills	2 H. & M. 424	614
Doe *v.* Marchetti	1 B. & Ad. 715.	170
—— *v.* Mills	2 A. & E. 17.	8
—— *v.* Underdown	Willes, 293	46
—— *v.* Walker	12 M. & W. 591	110
—— *v.* ———	5 B. & C. 111	170
Dominion of Canada Freehold Estate and Timber Company, In re	55 L. T. (N.S.) 347	492
Donaldson, In re	27 Ch. D. 544	129
Driffield and East Riding Pure Linseed Cake Company *v.* Waterloo Mills Cake and Warehousing Company	31 Ch. D. 638	416
Drury *v.* Macnamara	5 E. & B. 612	170
Dudley (Corporation of), In re	8 Q. B. D. 86	21
Durham and Northumberland Building Society *v.* Davidson	8 Times L. R. 428	383
Dyer's Case, The	2 Hen. 5	647

E.

Eardley *v.* Granville	3 Ch. D. 826.	434
Ecclesiastical Commissioners for England *v.* Rowe	5 App. Cas. 736	166
Edwards, In re	63 L. T. (N.S.) 481	106
——— *v.* Brown	1 Cro. & J. 307	10
Egerton *v.* Brownlow (Lord)	4 H. L. C. 1	662
Elbinger Actien Gesellschaft *v.* Claye	Law Rep. 8 Q. B. 313	599
Elliot v. North-Eastern Railway Company	10 H. L. C. 333	27
Empire Mining Company, In re	44 Ch. D. 402	485
Errington *v.* Metropolitan District Railway Company	19 Ch. D. 559	431
Evans v. Bicknell	6 Ves. 174	356
Evanturel *v.* Evanturel	Law Rep. 6 P. C. 1	665

F.

Faithfull *v.* Ewen	7 Ch. D. 495.	710
Falcke *v.* Scottish Imperial Insurance Company	34 Ch. D. 234	711
Farrar *v.* Winterton (Earl of)	5 Beav. 1	216
Farrer *v.* Lacy, Hartland & Co.	25 Ch. D. 636; 31 Ch. D. 42	279
Faussett *v.* Carpenter	2 Dow. & C. 232; 5 Bli. (N.S.) 75	106, 115
Fenton *v.* Wills	7 Ch. D. 33	190
Field *v.* Hopkins	44 Ch. D. 524	132
Finnis *v.* Forbes	24 Ch. D. 591	181
Flower, In re	62 L. T. (N.S.) 216; 63 L. T. (N.S.) 201.	588
Follit *v.* Eddystone Granite Quarries	[1892] 3 Ch. 75	484
Foster, In re	45 Ch. D. 629	294, 588
—— *v.* Mackinnon	Law Rep. 4 C. P. 704	5
Fowler, In re	16 Ch. D. 723	63
Franks, In re	[1892] 1 Q. B. 646	689
Freehold Land and Brickmaking Company, In re	Law Rep. 9 Eq. 367	373

		PAGE
Freeland *v.* Stansfeld	2 Sm. & Giff. 479	582
Freemantle *v.* Silk Throwsters' Company	1 Lev. 229	658
Freston, In re	11 Q. B. D. 545	266
Frost, In re	43 Ch. D. 246	55
Furneaux *v.* Rucker	W. N. (1879) 135	330

G.

Gale *v.* Reed	8 East, 80	671
Gardner *v.* Irvin	4 Ex. D. 49	689
Garnett *v.* Ferrand	6 B. & C. 611	681
Gatling Gun, In re	43 Ch. D. 628	500
Gaunt *v.* Fynney	Law Rep. 8 Ch. 8	323
General Finance, Mortgage and Discount Company *v.* Liberator Permanent Benefit Building Society	10 Ch. D. 15	4, 526
German *v.* Chapman	7 Ch. D. 271	324
Gibson, In re	Law Rep. 2 Eq. 669	216
——— *v.* Holland	Law Rep. 1 C. P. 1	99
——— *v.* Rogers	Amb. 92	333
Glanville's Trusts, In re	W. N. (1878) 21	408
Goodlad *v.* Burnett	1 K. & J. 341	105
Governors of the Charity for the Relief of the Poor Widows and Children of Clergymen *v.* Sutton	27 Beav. 651.	181
Gow *v.* Forster	26 Ch. D. 672	295
Great Western Railway Company *v.* Bennett	Law Rep. 2 H. L. 27	430
Green *v.* Elkins	2 Atk. 473	331
Greer *v.* Young	24 Ch. D. 545	711
Greys Brewery Company, In re	25 Ch. D. 400	687
Gunmakers' Company *v.* Fell	Willes, 384	653

H.

Haggin *v.* Comptoir D'Escompte de Paris	23 Q. B. D. 519	365
Halsey *v.* Brotherhood	15 Ch. D. 514	418
Hargreaves, In re	43 Ch. D. 401	55
———— *v.* Parsons	13 M. & W. 561	89
Harms *v.* Parsons	32 L. J. (Ch.) 247	643
Harpham *v.* Shacklock	19 Ch. D. 207	614
Harrison *v.* Godman	1 Burr. 12	658
———— *v.* Good	Law Rep. 11 Eq. 338	324
Hart *v.* Frontino and Bolivia South American Gold Mining Company	Law Rep. 5 Ex. 111	624
Harvey, In re	39 Ch. D. 289	55
——— *v.* Harvey	26 Ch. D. 644	258
Hasluck *v.* Pedley	Law Rep. 19 Eq. 271	46
Haven Gold Mining Company, In re	20 Ch. D. 151	606
Hawksworth *v.* Hawksworth	Law Rep. 6 Ch. 539	145
Hay *v.* Swedish and Norwegian Railway Company	5 Times L. R. 460	485
—— *v.* Watkins	3 D. & War. 339	286
Hayne *v.* Maltby	3 T. R. 438	10
Heath *v.* Crealock	Law Rep. 18 Eq. 215; 10 Ch. 22.	4, 358
Henry Pound, Son, & Hutchins, In re	42 Ch. D. 402	272
Hensman *v.* Fryer	Law Rep. 3 Ch. 420	190

		PAGE
Hetherington *v.* Groome	13 Q. B. D. 789	338
Hibbert *v.* Cooke	1 S. & S. 552	154
Hibblewhite *v.* M'Morine	6 M. & W. 200	613
Higinbotham *v.* Holme	19 Ves. 88	580
Hinde *v.* Gray	1 Man. & G. 195	640
Hitchcock *v.* Coker	6 A. & E. 438	640
Hobson, In re	55 L. J. (Ch.) 422; 53 L. T. (N.S.) 627; 34 W. R. 70	588
Hoghton *v.* Hoghton	15 Beav. 278	750
Holland *v.* Ellis	1 Vent. 278	681
Hollis *v.* Goldfinch	1 B. & C. 205	24
Holt *v.* Collyer	16 Ch. D. 718	80
Holyland *v.* Lewin	26 Ch. D. 266	570
Homer *v.* Ashford	3 Bing. 322	652
Horbury Bridge Coal, Iron, and Waggon Company, In re	11 Ch. D. 109	603
Horner *v.* Graves	7 Bing. 735	643
Hotchkys, In re	32 Ch. D. 408	160
Houghton Estate, In re	30 Ch. D. 102	160
Household, In re	27 Ch. D. 553	160
Howarth *v.* Howarth	11 P. D. 95	266
Huguenin *v.* Baseley	14 Ves. 273; 2 W. & T. L. C. in Eq. 6th Ed. p. 597	750
Hunlocke *v.* Blacklowe	2 Wms. Saund. (6th Ed.) 156 b	652
Hunt *v.* Elmes	2 D. F. & J. 578; 28 Beav. 631	357
Hunter *v.* Atkins	3 My. & K. 113	750
——— *v.* Potts	4 T. R. 182; 2 Rev. Rep. 353	719
——— *v.* Walters	Law Rep. 7 Ch. 75	9
Hurst, In re	29 L. R. Ir. 219	160
Hutchinson *v.* Barrow	6 H. & N. 583	105

I.

Irrigation Company of France, In re	Law Rep. 6 Ch. 176	732

J.

Jackson, In re	21 Ch. D. 786	153
Jay, Ex parte	14 Ch. D. 19	581
Jeffery, In re	[1891] 1 Ch. 671	329
Jesse *v.* Lloyd	48 L. T. (N.S) 656	159
Jinks *v.* Edwards	11 Ex. 775	170
Job *v.* Job	6 Ch. D. 562.	73
Johnston's Claim	Law Rep. 6 Ch. 212	74
Jones *v.* Lees	1 H. & N. 189	640
——— *v.* Macaulay	[1891] 1 Q. B. 221	53
——— *v.* Ogle	Law Rep. 8 Ch. 192	45
——— *v.* Victoria Graving Dock Company	2 Q. B. D. 314	94
Joshua Stubbs, Limited, In re	[1891] 1 Ch. 475	272

K.

Kemp *v.* Sober	1 Sim. (N.S.) 517	324
Kennedy *v.* Green	3 My. & K. 699	9
——— *v.* Lyell	23 Ch. D. 387; 9 App. Cas. 81	689
Kidman *v.* Kidman	40 L. J. (Ch.) 359	331
King of Hanover *v.* Bank of England	Law Rep. 8 Eq. 350	408
Kingdon *v.* Nottle	1 M. & S. 355	10
——— *v.* ———	4 M. & S. 53	526

L.

		PAGE
Lainson *v.* Tremere	1 A. & E. 792	4
Lambert *v.* Taylor	4 B. & C. 138	680
Lane, In re	14 Ch. D. 856	216
—— *v.* Newdigate	10 Ves. 192	122
Langham, In re	60 L. J. (Ch.) 110	698
Laythoarp *v.* Bryant	2 Bing. N. C. 735	100
Leake *v.* Robinson	2 Mer. 363	571
Leather Cloth Company *v.* Lorsont	Law Rep. 9 Eq. 345	639
Legg *v.* Mathieson	2 Giff. 71	576
Leighton *v.* Wales	3 M. & W. 545	656
Lepard *v.* Vernon	2 V. & B. 51	358
Leroux *v.* Brown	12 C. B. 801	97
Lewis *v.* Campbell	8 Taunt. 715	537
London and Suburban Bank, In re	[1892] 1 Ch. 604	398
London Joint Stock Bank *v.* Simmons	[1892] A. C. 201	614
Low *v.* Bouverie	[1891] 3 Ch. 82	5, 624
Lowestoft, Yarmouth, and Southwold Tramways Company, In re	6 Ch. D. 484	313
Lucas *v.* Dixon	22 Q. B. D. 357	96
Lumley *v.* Wagner	1 D. M. & G. 604	120
Lyon *v.* Home	Law Rep. 6 Eq. 655	749

M.

		PAGE
M'Intosh *v.* Ogilvie	2 Rev. Rep. 355, n.	719
Mackay, Ex parte	Law Rep. 8 Ch. 643	580
Mackenzie *v.* Bradbury	35 Beav. 617	90
—— *v.* Childers	43 Ch. D. 265	201, 345
—— *v.* Cox	9 Car. & P. 632	74
Mackereth *v.* Glasgow and South Western Railway Company	Law Rep. 8 Ex. 149	365
M'Leod *v.* Drummond	14 Ves. 353; 17 Ves. 152	358
McMahon *v.* North Kent Ironworks Company	[1891] 2 Ch. 148	576
Maddison *v.* Alderson	8 App. Cas. 467	89
Makins *v.* Percy Ibotson & Sons	[1891] 1 Ch. 133	574
Mallan *v.* May	11 M. & W. 653	636
Mander *v.* Falcke	[1891] 3 Ch. 488	258
Manners *v.* Mew	29 Ch. D. 725	358
Maple & Co. *v.* Junior Army and Navy Stores	21 Ch. D. 369	221
March, In re	27 Ch. D. 166	45
Marsden's Trust, In re	4 Drew. 594	287
Martinez *v.* Cooper	2 Russ. 198	356
Matthison *v.* Clarke	3 Drew. 3	132
Mellor *v.* Watkins	Law Rep. 9 Q. B. 400	533
Mercantile Investment and General Trust Company *v.* International Company of Mexico	[1893] 1 Ch. 484, n.	478
Merryweather *v.* Moore	[1892] 2 Ch. 518	222
Metropolitan Asylum District *v.* Hill	5 App. Cas. 582	470
Metropolitan Board of Works *v.* Metropolitan Railway Company	Law Rep. 3 C. P. 612; 4 C. P. 192	22
Middlemore *v.* Goodale	1 Roll. Abr. 521, K. 6; Cro. Car. 503; 1 Sm. L. C. 8th Ed. p. 87	536

		PAGE
Midland Railway Company *v.* Haunchwood Brick and Tile Company	20 Ch. D. 552	431
——— *v.* Miles	33 Ch. D. 632	432
——— *v.* Robinson	37 Ch. D. 386; 15 App. Cas. 19	430, 461
Miles *v.* New Zealand Alford Estate Company	32 Ch. D. 266	485
Millington *v.* Thompson	3 Ir. Ch. Rep. 236	89
Mills *v.* Dunham	[1891] 1 Ch. 576	636
——— *v.* Norris	5 Ves. 335	331
Mitchel *v.* Reynolds	1 P. Wms. 181; 1 Sm. L. C. 9th Ed. p. 430	641
Mitchell *v.* Homfray	8 Q. B. D. 587	749
——— *v.* Scott	8 Court Sess. Cas. 4th Series, 875	720
Mogul Steamship Company *v.* McGregor, Gow & Co.	[1892] A. C. 25	643
Montgomerie *v.* United Kingdom Mutual Steamship Association	[1891] 1 Q. B. 370	599
Monypenny v. Dering	2 D. M. & G. 145	57
Moor *v.* Raisbeck	12 Sim. 123	215
Morgan *v.* Gronow	Law Rep. 16 Eq. 1	59
Morison *v.* Moat	9 Hare, 241	235
Mormich *v.* Fenestre	C. A. Aug. 11th, 1892	640
Morris, In re	44 Ch. D. 151	254
——— *v.* Ashbee	Law Rep. 7 Eq. 34	222
——— *v.* Wright	Law Rep. 5 Ch. 279	222
Moul *v.* Groenings	[1891] 2 Q. B. 443	35
Mumford *v.* Gething	7 C. B. (N.S.) 305	656
——— *v.* Stohwasser	Law Rep. 18 Eq. 556	613

N.

Nanney *v.* Morgan	37 Ch. D. 346	616
National Provincial Bank of England *v.* Games	31 Ch. D. 582	133
——— *v.* Jackson	33 Ch. D. 1	10
Nelson *v.* Worssam	W. N. (1890) 216	259
Nevin, In re	[1891] 2 Ch. 299	145
New Zealand and Australian Land Company *v.* Watson	7 Q. B. D. 374	598
Newbery, In re	Law Rep. 1 Ch. 263	145
Newby *v.* Von Oppen	Law Rep. 7 Q. B. 293	365
Nicholls *v.* Stretton	10 Q. B. 346	640
Nightingale *v.* Lawson	1 Bro. C. C. 440	64
Nind *v.* Marshall	1 Brod. & B. 319	529
Norfolk's (Duke of) Case	3 Ch. Cas. 33	667
North Australian Territory Company, In re	45 Ch. D. 87	688
Northern Counties of England Fire Insurance Company *v.* Whipp	26 Ch. D. 482	356
Norwich and Norfolk Provident Permanent Benefit Building Society, In re	1 Ch. D. 481	380
Nottingham Patent Brick and Tile Company *v.* Butler	15 Q. B. D. 261; 16 Q. B. D. 778	201, 342
Nuttall *v.* Manchester (Mayor of)	8 Times L. R. 513	243
Nutter *v.* Messageries Maritimes de France	54 L. J. (Q. B.) 527	365

		PAGE
O.		
Olney *v.* Bates	3 Drew. 319	567
Ooregum Gold Mining Company of India *v.* Roper	[1892] A. C. 125	731
Ormrod's Settled Estate	[1892] 2 Ch. 318	159
O'Shea *v.* O'Shea	15 P. D. 59	257
——— *v.* Wood	[1891] P. 286	689
P.		
Palermo, The	9 P. D. 6	689
Parfitt *v.* Lawless	Law Rep. 2 P. & M. 462	751
Park, In re	41 Ch. D. 326	131
Parker, In re	29 Ch. D. 199	510
——— *v.* Blenkhorn	14 App. Cas. 1	510
Peacock, In re	14 Ch. D. 212	403
——— *v.* Penson	11 Beav. 355	351
Pearks *v.* Moseley	5 App. Cas. 714	571
Pearson *v.* Scott	9 Ch. D. 198	597
Pedder *v.* Hunt	18 Q. B. D. 565	170
Pemberton *v.* Vaughan	10 Q. B. 87	658
Perry-Herrick *v.* Attwood	2 De G. & J. 21	357
Petty *v.* Daniel	34 Ch. D. 172	254
Pettyt *v.* Janeson	6 Madd. 146	394
Phœnix Bessemer Steel Company, In re	44 L. J. (Ch.) 683	728
Pickering *v.* Ely (Bishop of)	2 Y. & C. (Ch.) 249	121
Pigot's Case	11 Rep. 26 b	8
Pilkington *v.* Scott	15 M. & W. 657	640
Pollard, In re	Law Rep. 2 P. C. 106	257
——— *v.* Photographic Company	40 Ch. D. 345	221
Portal & Lamb, In re	27 Ch. D. 600; 30 Ch. D. 50	105
Portland (Duke of) *v.* Topham	11 H. L. C. 32	287
Pountney *v.* Clayton	11 Q. B. D. 820	432
Powell Duffryn Steam Coal Company *v.* Taff Vale Railway Company	Law Rep. 9 Ch. 331	128
Price *v.* Green	16 M. & W. 346	638
Prince Albert *v.* Strange	2 De G. & Sm. 652; 1 & G. 25	221
Prince of Wales Assurance Company *v.* Palmer	25 Beav. 605	681
Printing and Numerical Registering Company *v.* Sampson	Law Rep. 19 Eq. 462	641
Proctor *v.* Sargent	2 Man. & G. 33	653
Pyle Works, In re	44 Ch. D. 534	729
Q.		
Quebrada Railway, Land and Copper Mining Company, In re	40 Ch. D. 363	500
Quihampton *v.* Going	24 W. R. 917	89
R.		
Rannie *v.* Irvine	7 Man. & G. 969	656
Ratcliffe *v.* Barnard	Law Rep. 6 Ch. 652	357
Raw *v.* Cutten	9 Bing. 96	73
Reade, Re	33 Sol. J. 219	509

		PAGE
Reeve *v.* Palmer	5 C. B. (N.S.) 84	74
Reg. *v.* Barnardo	23 Q. B. D. 305	266
—— *v.* Government Stock Investment Company	3 Q. B. D. 442	606
—— *v.* Mason	2 Salk. 447	680
—— *v.* Shropshire (Justices of)	8 A. & E. 173	485
—— *v.* Toole	16 W. R. 439; I. R. 2 C. L. 36	680
Reinhardt *v.* Mentasti	42 Ch. D. 685	323
Renals *v.* Cowlishaw	9 Ch. D. 125; 11 Ch. D. 866	201, 345
Reuter's Telegram Company *v.* Byron	43 L. J. (Ch.) 661	221
Rex *v.* Aldenham	2 Lev. 152	681
—— *v.* Harrison	3 Burr. 1323	658
Rhodes *v.* Bate	Law Rep. 1 Ch. 252	749
Rica Gold Washing Company, In re	11 Ch. D. 36	732
Richards *v.* Kitchen	25 W. R. 602	258
Rigby *v.* Connol	14 Ch. D. 482	120
—— *v.* Great Western Railway Company	15 L. J. (Ch.) 266	121
Right *v.* Bucknell	2 B. & Ad. 278	11
Roach *v.* Trood	3 Ch. D. 429	287
Roberts, In re	43 Ch. D. 52	132
Robertson, In re	19 Q. B. D. 1	510
—— *v.* Broadbent	8 App. Cas. 812	191
Robinson *v.* Hardcastle	2 T. R. 241	57
Rochford *v.* Hackman	9 Hare, 475	331
Roderick *v.* Aston Local Board	5 Ch. D. 328	23
Rogers *v.* Parry	B. R. Trin.; 11 Jac. 1 Rob. 223; 2 Bulst. 136	652
Rosenberg *v.* Northumberland Building Society	22 Q. B. D. 373	377
Rousillon *v.* Rousillon	14 Ch. D. 351	636
Routledge *v.* Dorril	2 Ves. 357	57
Royal Society of London and Thompson	17 Ch. D. 407	181
Russell, In re	19 Ch. D. 432	216
—— *v.* Cambefort	23 Q. B. D. 526	366

S.

Sadler *v.* Pratt	5 Sim. 632	286
Sandys, Ex parte	42 Ch. D. 98	622
Saxton *v.* Saxton	13 Ch. D. 359	216
Scanlan, In re	40 Ch. D. 200	145
Scarf *v.* Jardine	7 App. Cas. 345	11
Sclater *v.* Cottam	3 Jur. (N.S.) 630	132
Scott *v.* Carluke (Parochial Board of)	6 Court Sess. Cas. 4th Series, 616	243
—— *v.* Scarborough (Earl of)	1 Beav. 154	331
Scroggs *v.* Scroggs	1 Amb. 272	287
Sharples *v.* Adams	32 Beav. 213	613
Sheldon *v.* Fortescue Aland	3 P. Wms. 107	469
Shepherd *v.* Ingram	Amb. 448	330
Shropshire Union Railways and Canal *v.* Reg.	Law Rep. 7 H. L. 496	615
Sidney *v.* Clarkson	35 Beav. 118.	345
Sievewright *v.* Archibald	17 Q. B. 103	94
Simpson *v.* Gutteridge	1 Madd. 609	357
Slark *v.* Dakyns	Law Rep. 10 Ch. 35	56

		PAGE
Slater *v.* Darlaston Steel and Iron Company	W. N. (1877) 165	485
Smith *v.* Great Western Railway Company	3 App. Cas. 165	444
Sneesby *v.* Thorne	7 D. M. & G. 399	358
Société Générale de Paris *v.* Tramways Union Company	14 Q. B. D. 424	614
——— *v.* Walker	11 App. Cas. 20	614, 622
Solicitor (A), In re	14 Ch. D. 152	257
Southwark and Vauxhall Water Company *v.* Quick	3 Q. B. D. 315	690
Speight *v.* Gaunt	9 App. Cas. 1	74
Spence, In re	2 Ph. 247	147
Spencer's Case	5 Rep. 16 a	526
Spicer *v.* Martin	34 Ch. D. 1; 14 App. Cas. 12	201, 345
Standard Manufacturing Company, In re	[1891] 1 Ch. 627	577
Stone *v.* Lickorish	[1891] 2 Ch. 363	131
Storer *v.* Great Western Railway Company	2 Y. & C. (Ch.) 48	122
Stott *v.* Milne	25 Ch. D. 710	558
Stourton *v.* Stourton	8 D. M. & G. 760	145
Stoveld, Ex parte	1 G. & J. 303	582
Strangways, In re	34 Ch. D. 423	703
Stuart *v.* Diplock	43 Ch. D. 343	77
Swain, In re	[1891] 3 Ch. 233	308
Swanston, Re	31 Sol. J. 427	160
Sweet *v.* Benning	16 C. B. 459	221
Sweeting *v.* Pearce	9 C. B. (N.S.) 534	597

T.

Tallis *v.* Tallis	1 E. & B. 391; 16 Jur. 746, n.	639, 642
Taylor, In re	18 Beav. 165.	132
——— *v.* Johnston	19 Ch. D. 603	750
——— *v.* Needham	2 Taunt. 278	8, 530
——— *v.* Russell	[1892] A. C. 244	614
Taylor's Estate, In re	22 Ch. D. 495	89
Thatcher's Trusts, Re	26 Beav. 365	56
Thoroughgood's Case	2 Rep. 5 b	8
Thursby *v.* Plant	1 Wms. Saund. 234 a & b	537
Tinkler's Estate, In re	Law Rep. 20 Eq. 456	295
Tod-Heatly *v.* Benham	40 Ch. D. 80	324
Tomkinson *v.* Balkis Consolidated Company	[1891] 2 Q. B. 614	624
Tosh *v.* North British Building Society	11 App. Cas. 489	381
Treherne *v.* Dale	27 Ch. D. 66	259
Trethewy *v.* Helyar	4 Ch. D. 53	190
Trevor *v.* Whitworth	12 App. Cas. 409	496
Trust and Investment Corporation of South Africa, In re	[1892] 3 Ch. 332	210
Turner *v.* Hancock	20 Ch. D. 303	555

U.

Union Plate Glass Company, In re	42 Ch. D. 513	503

		PAGE
V.		
Vivian and Company, In re	W. N. (1886) 32	503
Vorley *v.* Cooke	1 Giff. 230	10
Vyse *v.* Foster	Law Rep. 8 Ch. 309	164
W.		
Wallis, In re	25 Q. B. D. 176	131
——— *v.* Day	2 M. & W. 273	640
Wallwyn *v.* Lee	9 Ves. 24	357
Walter *v.* Howe	17 Ch. D. 709	221
Walton *v.* Edge	10 App. Cas. 33	383
Wannel *v.* Chamberlain of London	1 Str. 675	658
Ward *v.* Byrne	5 M. & W. 548	640
Watt *v.* Creyke	3 Sm. & Giff. 362	286
Webb *v.* Sadler	Law Rep. 8 Ch. 419	56
Weir *v.* Bell	3 Ex. D. 238	73
Welford *v.* Beazely	3 Atk. 503	95
West Riding of Yorkshire Permanent Benefit Building Society, In re	43 Ch. D. 407	383
Wheeler *v.* Le Marchant	17 Ch. D. 675	686
Whelan *v.* Palmer	39 Ch. D. 648	287
Whelpdale's Case	5 Rep. 118 b	536
Whitmore *v.* Mason	2 J. & H. 204	580
Whittaker *v.* Howe	3 Beav. 383	636
Whitwood Chemical Company *v.* Hardman	[1891] 2 Ch. 416	121
Wildes *v.* Dudlow	Law Rep. 19 Eq. 198	89
Wildy *v.* Mid-Hants Railway Company	16 W. R. 409	574
Wilkinson *v.* Evans	Law Rep. 1 C. P. 407	99
Williams *v.* Owen	2 N. R. 585	105
Wilson *v.* Furness Railway Company	Law Rep. 9 Eq. 28	122
——— *v.* Greenwood	1 Swans. 471	580
——— *v.* Miles Platting Building Society	22 Q. B. D. 381, n.	377
Windham, In re	4 D. F. & J. 53	472
Wollaston *v.* King	Law Rep. 8 Eq. 165	59
Wolverhampton and Walsall Railway Company *v.* London and North Western Railway Company	Law Rep. 16 Eq. 433	121
Wood, In re	32 Ch. D. 517	89
Woodhouse *v.* Meredith	1 Mer. 450	214
Wren *v.* Weild	Law Rep. 4 Q. B. 730	418
Wyatt *v.* Cook	W. N. (1868) 237	132
Y.		
Yarnold *v.* Wallis	4 Y. & C. (Ex.) 160	109
Young *v.* Timmins	1 Tyrw. 226	655

CASES

DETERMINED BY THE

CHANCERY DIVISION

AND IN

LUNACY

AND ON APPEAL THEREFROM IN THE

COURT OF APPEAL.

ONWARD BUILDING SOCIETY *v.* SMITHSON.

C. A.

1892

KEKEWICH, J.

May 12.

C. A.

Oct. 27, 28.

[1891 O. 631.]

Estoppel—Covenant running with the Land—Conveyance obtained by Fraud.

S. and *R.*, trustees of a will, sold and conveyed a piece of land to *T.*, who mortgaged it to *B.* Some time afterwards *T.* induced them to execute to him a second conveyance of part of the same land, he representing to them that it was a conveyance of a piece of land not previously purchased by him. By this deed, which recited that the testator was seised in fee at his death, and recited his will, by which he devised his real estate to the vendors giving them a power of sale, recited his death, and that the vendors in exercise of the power had contracted for the sale to *T.* of this piece of land in fee simple free from incumbrances, and that *S.* as beneficial owner had agreed to concur, *S.* and *R.* granted, and *S.* confirmed, the land to *T.* in fee and *S.* and *R.* entered into the usual trustee covenant that they had done no act to incumber, and *S.* also covenanted for title. *T.* then mortgaged this land to the Plaintiffs. Some years afterwards *B.* took possession, and the Plaintiffs' security proved worthless. The Plaintiffs sued *S.* and *R.* for indemnity on the ground that *S.* and *R.* had by the second conveyance to *T.* misrepresented their title, and in the alternative for damages on the covenants. *Kekewich*, J., gave the Plaintiffs the amount of the mortgage money and interest by way of damages:—

Held, on appeal, that the second conveyance to *T.* did not contain any such distinct averment that the Defendants were seised of the estate when they executed that conveyance as would estop them from denying that they were so seised; and that, as the Plaintiffs had no legal estate by estoppel or otherwise with which the covenants could run, the Plaintiffs could not sue the vendors on their covenants:

Held, further, that the Plaintiffs could not have any remedy on the

C. A.
1892
ONWARD BUILDING SOCIETY v. SMITHSON.

ground of misrepresentation by the Defendants, as the representation was made honestly:

Held, that a plea of *non est factum* could not have been sustained.

Whether, even if the conveyance had been in terms sufficient to create an estoppel, the Defendants could not, although the Plaintiffs were *bonâ fide* purchasers for value, have successfully defended themselves on the ground that the deed containing the covenants for title had been obtained by fraud, *quære*.

SAMUEL SMITHSON by will devised his real estates and chattels real to the Defendants, *H. S. C. Smithson* and *A. H. Russell*, their heirs, executors, administrators, and assigns, upon trust (except as to his Scotch estates) for his son, the said *H. S. C. Smithson*, if he should attain twenty-one, and he gave to his trustees a power of sale. The testator died in 1874.

Part of the estates was a property at *Shildon*, in the county of *Durham*, and the trustees sold portions of it in lots. They employed one *Toward* as agent about the sale.

On the 4th of December, 1875, the Defendants sold and conveyed to *Toward* a part of the *Shildon* property; and on the 25th of May, 1876, *Toward* mortgaged the property he had purchased to the *Bishop Auckland Building Society*.

In 1877, *Toward* tendered to the Defendants for execution what he stated to be a conveyance of a plot of land other than and additional to what they had previously conveyed to him. It was, in fact, a conveyance of a piece of land which formed part of what had already been conveyed to him in December, 1875. The Defendants, believing *Toward's* statement, executed the conveyance and received the purchase-money, £35 4*s*.

This conveyance, dated the 4th of April, 1877, was made between the Defendants, thereinafter called the vendors, of the first part; the Defendant *Smithson* of the second part; and *Toward*, thereinafter called the purchaser, of the third part; and began by reciting that "*Samuel Smithson*, late of *Lentran House* aforesaid, Esq., being at the date of his will, and so continuing to the time of his death, seised to him and his heirs in fee simple in possession free from incumbrances of an estate situate at *Shildon*, in the county of *Durham* (of which the plot of ground hereby granted forms part), and being also seised of freehold estates in *Scotland*," and entitled to personal estate, made his

will, the effect of which was shortly stated. It further recited the death of the testator and probate of his will, and that *H. S. C. Smithson* attained twenty-one in June, 1875, "And whereas the said vendors in exercise of the power so as aforesaid contained in the above in part recited will of the said *S. Smithson*, deceased, have contracted and agreed with the said purchaser for the absolute sale to him of the plot of ground and premises hereinafter particularly described and intended to be hereby granted, and the inheritance thereof in fee simple in possession free from incumbrances, at the price or sum of £35 4*s*. And whereas the said *H. S. C. Smithson*, as beneficial owner of the said real estate of the said *S. Smithson*, deceased, subject to the said power of sale, has agreed to concur in these presents," it was witnessed, "that in pursuance of and for effectuating the said contract and in consideration of the sum of £35 4*s*. to the said vendors paid by the purchaser," the Defendants granted and conveyed, and *Smithson* granted and confirmed, a piece of land, being, as above stated, part of the property comprised in the deed of the 4th of December, 1875, with a messuage then in course of building thereon, unto and to the use of the purchaser, his heirs and assigns. The vendors entered into the usual trustee covenant that they had done no act to incumber, and *Smithson* also entered into the usual covenants for title.

On the 22nd of September, 1877, *Toward*, producing the last-stated deed as his title, mortgaged the property comprised in it to the Plaintiffs, the *Onward Building Society*, to secure £330 advanced to him, and interest and other moneys.

In 1888 *Toward* absconded, and was afterwards adjudged bankrupt. The *Bishop Auckland Building Society* entered into possession of all the property comprised in their security, and the security of the Plaintiffs was found to be worthless.

The *Onward Building Society* brought this action against *Smithson* and *Russell*, and by their statement of claim alleged that they advanced the £330 on the faith that the representations made by the Defendants in the indenture of the 4th of April, 1877, were true, and that at the date of that indenture they had power to convey the premises comprised therein to *Toward* free from incumbrances, and they claimed a declaration

C. A. 1892 ONWARD BUILDING SOCIETY v. SMITHSON.

that by reason of the representations and covenants by and on the part of the Defendants contained in the indenture of the 4th of April, 1877, the Defendants were liable to make good to the Plaintiffs the moneys advanced by them on the security of the indenture of the 22nd of September, 1877, with interest since the last payment of interest by *Toward*, and an order on the Defendants to make good such principal moneys and interest; or, in the alternative, damages for breach of the covenants.

The action was heard before Mr. Justice *Kekewich* on the 12th of May, 1892.

Warmington, Q.C., and *Warrington*, for the Plaintiffs:—

As assigns of *Toward*, the Plaintiffs are entitled to sue on the covenants for title entered into by the Defendants in the deed of conveyance of the 4th of April, 1877. Those covenants run with the land, and the Defendants are estopped, as against the Plaintiffs, by the recitals in the deed from denying that the estate passed to *Toward*. In an action on a deed a person who made thereby a statement with a view to its being acted upon is estopped from denying that it is true: *Lainson* v. *Tremere* (1). The present case is governed by *Cuthbertson* v. *Irving* (2), where, in an action by the assign of a lessor against the lessee, it was held that the lessee was estopped from disputing that his lessor was seised of an estate in reversion, and that the plaintiff was entitled to sue on the covenants in the lease as assignee of the reversion, notwithstanding that the assignment to him shewed a want of title in the lessor. It may be that *Toward* would have been precluded by his fraud from suing the Defendants on the deed; but his fraud cannot prejudice the Plaintiffs, who were innocent purchasers for value. The averments in the deed are precise, and take the case out of the authority of *Heath* v. *Crealock* (3) and *General Finance, Mortgage, and Discount Company* v. *Liberator Permanent Benefit Building Society* (4).

Scott Fox, for the Defendants:—

There can be no estoppel in this case, for the averments in the

(1) 1 Ad. & E. 792.
(2) 4 H. & N. 742.
(3) Law Rep. 18 Eq. 215; 10 Ch. 22.
(4) 10 Ch. D. 15.

deed of conveyance are not sufficiently precise to work an estoppel. But even if it were otherwise, the Plaintiffs' case must fail.

The deed of conveyance, having been obtained from the Defendants by the fraud of *Toward*, was an absolute nullity, and no action of any kind can be maintained upon it: *Foster* v. *Mackinnon* (1).

Again, the Plaintiffs admit that by the conveyance of the 4th of April, 1877, nothing passed to *Toward*; and it is clear that *Toward*, having obtained the conveyance by fraud, could not have maintained an action on the covenants against the Defendants, and neither at Law nor in Equity can the Plaintiffs be in any better position. At Law they would have no estate to support the action, and must sue in the name of *Toward*; and if they sued in Equity in their own names, they could have no better title than their assignor.

The case of the Plaintiffs is, in truth, self-destructive. They affect to sue on a covenant which runs with land conveyed by the deed, and yet their very ground of action is that no land at all was conveyed.

[He referred also to *Low* v. *Bouverie* (2).]

Warrington, in reply:—

The argument last urged must come to this, that no one but the covenantee can sue on a covenant for title if in fact the covenantor had no title. This would be to take away the effect of a covenant for title in the very case in which it is the most needed.

Foster v. *Mackinnon* is not in point. The defence in that case was that the defendant never intended to execute the instrument in question; not, as here, that he was misled into executing it. The authorities with reference to *choses in action* have no application to a case like this, where the Plaintiffs are suing on a covenant which runs with the land.

KEKEWICH, J.:—

It is not likely that any real advantage would be gained by my reserving my judgment. I have looked into the cases, and I

(1) Law Rep. 4 C. P. 704.

(2) [1891] 3 Ch. 82.

C. A. 1892 ONWARD BUILDING SOCIETY v. SMITHSON. Kekewich, J.

think one might be induced to look into many cases; but it seems to me that this particular case depends upon the application of well-known principles, and that there is no great difficulty in applying them, nor any reason why I should not now apply them, to the best of my ability, without further consideration. The facts have so recently been mentioned to me by counsel, and are so simply stated in the pleadings, that, as they do not depend upon any conflict of evidence, it is not necessary for me now to repeat them. The point against Mr. *Warrington*, which he has not mentioned in his reply, is, I think, this, that it might be possible for the Defendants to plead that in the interval before the conveyance by them to *Toward*, under what I may call the nullity deed of the 4th of April, 1877, he had passed an estate, and that an estate in fee, to another person under his real title obtained through the effective deed of earlier date. It occurred to me for a moment that that might be a good plea. There is a technicality about it which rather struck me as deserving attention; but I think the answer to it is that for the purpose of an action like this, which is brought on the covenant of which the Plaintiffs are assigns by virtue of the mortgage to them, the conveyance to the first purchaser and the conveyance of April, 1877, must be treated and construed as independent instruments, and that what *Toward*, or the first purchaser, did as regards other persons with reference to other property has really no connection with the case which the Court is considering. Then, as regards the dilemma in which the Plaintiffs are sought to be placed, I think the answer has just been given. If Mr. *Scott Fox's* argument is correct, there never could be an action by an assign on a covenant for title when no title passed. It would be always an answer to say, except as against the original covenantee, "You are suing as an assign of a covenant because the covenant runs with the land, and yet with the same breath you say there is no land with which the covenant can run." That would destroy the covenant; and, however plausible it may appear, it is founded on a fallacy. You do take such estate as purports to pass to you, and as to that which purports to pass to you you do purport to be an assign of the covenant, and there have been, and I suppose will be again, actions on a covenant of that kind. Of course, as

regards an ordinary *chose in action*, an assignee cannot take any greater benefit than his assignor; but when you come to a covenant running with the land, you are outside those authorities. These gentlemen, no doubt, are innocent in one way—that is to say, they never intended to do anything wrong. They have been induced by fraud to do that which is noxious to the present Plaintiffs; they are answerable to them for what they have done. If persons enter into covenants they must be held to them. There is no occasion to refer in detail to the cases cited. The case of *Cuthbertson* v. *Irving* (1) seems to me to assist Mr. *Warrington*, and *Foster* v. *Mackinnon* (2) seems to be clearly distinguishable. But I decide this case on the broad principles applicable to a case of this kind.

C. C. M. D.

The judgment declared that the Plaintiffs were entitled to recover from the Defendants, by way of damages for breach of the covenants contained in the conveyance of the 4th of April, 1877, the moneys advanced by them on the mortgage of the 22nd of September, 1877, so that such moneys did not exceed the value of the property comprised in the mortgage at the date thereof; and gave consequential directions.

The Defendants appealed from this judgment. The appeal came on for hearing on the 27th of October, 1892. C. A.

Scott Fox, for the Appellants:—

The Defendants contend that as the Plaintiffs claim to sue on this covenant in the character of assigns of *Toward*, they stand in no better position than their assignor. The covenant was obtained by *Toward's* fraud, and he could have maintained no action upon it himself: no more can the Plaintiffs. This is indisputably so if they claim only as assignees of an equitable estate. If they claim as assignees of a legal estate, the first answer is that no legal estate in fact passed by the deed to *Toward*, nor from him to the Plaintiffs. If the Defendants are estopped from denying that a legal estate passed, so as to carry with it the benefit of the covenant running with the land at law,

(1) 4 H. & N. 742. (2) Law Rep. 4 C. P. 704.

C. A. 1892 ONWARD BUILDING SOCIETY v. SMITHSON.

even so the transfer of such estate by estoppel gives the Plaintiffs no better right to enforce the covenant than *Toward* had. No case can be found in which, even at law, an assign has recovered damages upon a covenant where the assignor could have maintained no action. A covenant with a man and his assigns does not give him a negotiable security to which he can give any better title than he himself has. In *Doe* v. *Mills* (1), *Taunton*, J., lays it down that the assignee of a lease stands in the position of the assignor "for all purposes better or worse." In *Taylor* v. *Needham* (2), Lord *Mansfield* says that he who takes an estate under a deed is privy in estate, and therefore never can be in a better situation than he from whom he takes it. This is an answer to the action, assuming the deed of April, 1877, to be a valid deed, and to be in such terms as to work an estoppel.

But the deed is a void deed, and a plea of *non est factum* could be supported, because it was executed upon the representation that it was a conveyance of a different property from that previously conveyed: *Keilwey*, 21 Hen. 7 (3); *Thoroughgood's Case* (4); *Pigot's Case* (5); *Foster* v. *Mackinnon* (6). And if the facts will not support a plea of *non est factum*, the deed as it stands works no estoppel, because it contains no distinct allegation that the Defendants were seised in fee at the date of the execution of the deed: *General Finance, Mortgage and Discount Company* v. *Liberator Permanent Benefit Building Society* (7). Moreover, if our second conveyance to *Toward* worked against us, so would his mortgage to the *Bishop Auckland Society* work an estoppel against him, and any legal estate, whether by estoppel or otherwise, which passed to *Toward* from us, in April, 1877, would go to feed the other estoppel, and would pass at once to the *Bishop Auckland Society*; so that no legal estate, whether by estoppel or otherwise, remained in *Toward* to pass to the Plaintiffs in September, 1877. Again, estoppels are mutual, and if the Defendants are estopped from saying that no legal estate passed by the deeds of April

(1) 2 Ad. & E. 17, 20.
(2) 2 Taunt. 278.
(3) Page 70 b, pl. 6.
(4) 2 Rep. 5 b.
(5) 11 Rep. 26 b.
(6) Law Rep. 4 C. P. 704.
(7) 10 Ch. D. 15.

and September, 1877, so are the Plaintiffs. They cannot at the same time rely on the estoppel to establish their alleged right to sue on the covenant, and disaffirm the estoppel for the purpose of proving a breach of the covenant.

Two cases were referred to in the Court below as being against the Defendants. The first of them, *Lainson* v. *Tremere* (1), turned on a mere point of pleading. The other, *Cuthbertson* v. *Irving* (2), decided that a covenant ran with a reversion created by estoppel, in the sense that the assignee of the reversion had the same right to sue the tenant on his covenants that the original lessor had. That does not shew that the assignee of a lease or other estate has a better right to sue the lessor or grantor than the original lessee or grantee had. The case is really in my favour, even if it be admitted, which I deny, that the conveyance of April, 1877, operated by way of estoppel at all.

The Plaintiffs hardly pretend that, if they fail on the covenant, they can maintain the action on the ground of misrepresentation of title by the Defendants, for the Defendants acted honestly and made no intentional misrepresentation: *Low* v. *Bouverie* (3).

Warmington, Q.C., and *Warrington*, for the Plaintiffs:—

The deed, we contend, is not void, but only voidable; and nothing having been done to avoid it, it must be treated as a valid deed. We accept the law as laid down in *Foster* v. *Mackinnon* (4); but the facts here do not bring the case up to it, and a plea of *non est factum* could not be sustained. The Defendants were not deceived as to the nature of the deed. They intended to convey the piece of land comprised in it. They were deceived only by the suppression of the fact that they had already conveyed it, and therefore had nothing left in them to convey. That is a fraud *dehors* the deed, and does not prevent its being the Defendants' deed, though they might, no doubt, have had it set aside for fraud. In *Hunter* v. *Walters* (5), Lord Justice *James* says that the circumstances in *Kennedy* v. *Green* (6), and *Vorley*

(1) 1 Ad. & E. 792.
(2) 4 H. & N. 742; 6 H. & N. 135.
(3) [1891] 3 Ch. 82.
(4) Law Rep. 4 C. P. 704.
(5) Ibid. 7 Ch. 75, 84.
(6) 3 My. & K. 699.

C. A. 1892 ONWARD BUILDING SOCIETY v. SMITHSON.

v. *Cooke* (1) would not have supported a plea of *non est factum;* and in both those cases the circumstances were fully as favourable to such a plea as here. In *National Provincial Bank of England* v. *Jackson* (2), deeds obtained by fraud were held to be voidable only, not void. The most instructive case as to *non est factum* is *Edwards* v. *Brown* (3).

[BOWEN, L.J., referred to the judgment of *Mellish*, L.J., in *Hunter* v. *Walters* (4), and to *Kingdon* v. *Nottle* (5).]

The grantors are estopped from saying that they had not the fee in the land, for the recitals clearly make out a title in the conveying parties, and *Cuthbertson* v. *Irving* (6), which decides that a covenant runs with an estate created by estoppel, decides the case. It is urged that the fraud is a defence; but we contend that in an action by a grantee of land on a covenant which runs with the land, fraud by the original covenantee is no defence unless it was such fraud as would support a plea of *non est factum*. There is nothing in the books to shew that an assign cannot sue on a covenant running with the land in the same way as if the covenant had been made with himself, and nothing to shew that he can be affected by equities affecting the original covenantee.

Scott Fox, in reply:—

It is contended for the Plaintiffs that if the deed of April, 1877, is voidable only, and not void, then until it is set aside it has the same operation as a perfectly valid deed. As to the really operative part of the deed, that may be so, but not as to any supposed effect of the deed by way of estoppel. Estoppel is a rule "founded on law, conscience, and justice" (*per* Lord *Kenyon* in *Hayne* v. *Maltby* (7)), preventing a party from alleging anything contrary to the conventional state of things on the faith of the truth of which he has induced another to act. But if the deed is obtained by fraud, it is not against conscience for the person defrauded, when he ascertains the truth, to allege it, though it contradicts the recitals which he has been deceived

(1) 1 Giff. 230.
(2) 33 Ch. D. 1.
(3) 1 Cro. & J. 307.
(4) Law Rep. 7 Ch. 75.
(5) 1 M. & S. 355.
(6) 4 H. & N. 742; 6 H. & N. 135.
(7) 3 T. R. 438, 441.

into making. On the contrary, it is against conscience for the person who has obtained a statement or admission by fraud, to endeavour to bind the person deceived to the statement or admission so fraudulently obtained. No deed obtained by fraud can operate by way of estoppel against the person defrauded and in favour of the person guilty of the fraud, unless, indeed, the person defrauded elects to affirm the deed after discovering the fraud. The Defendants do not affirm the deed; they repudiate it altogether, though, as it in fact was inoperative in effect and passed nothing, they have not taken any steps to set it aside.

[BOWEN, L.J., referred to *Right* v. *Bucknell* (1), as shewing that there must be a precise and specific averment of a particular fact to create estoppel.]

Every statement of fact recited in the deed of April, 1877, is literally true, and the Defendants do not seek to contradict any such statement. They only add the further statement that prior to the execution of the deed they had executed another conveyance to *Toward* which they had forgotten.

As to the other point, that the assignee of the estate has no better right to sue on the covenant than the assignor had, it may be noticed that the statute 32 Hen. 8, c. 34, gives lessees, grantees, and their assigns, the like action and remedy on the covenants in their leases against grantees of the reversion as the same lessees might have had against the lessors and grantors. The lessee's right of action on the covenant is thus made the measure of his assign's right of action on the covenant as against assignees of the reversion. This implies that as against the original lessor or grantor the lessee or grantee and his assign had at common law, independently of the statute, identical rights of action on the covenants.

[He also cited Lord *Selborne's* remarks in *Scarf* v. *Jardine* (2), on the impossibility of at once relying on the estoppel and setting up the facts so as to create a liability by the combination of the two.]

LINDLEY, L.J.:—

I must, in the first place, express our obligation to Mr. *Scott Fox* for his very able argument in this case, which is a peculiar

(1) 2 B. & Ad. 278. (2) 7 App. Cas. 345, 350.

C. A. 1892 ONWARD BUILDING SOCIETY v. SMITHSON. Lindley, L.J.

one. *Toward* cheated both the Plaintiffs and the Defendants, and the Plaintiffs have lost money through his fraud. The question we have to decide is, whether the Defendants are liable to indemnify the Plaintiffs.

The Defendants, who were the trustees of the will of Mr. *Smithson*, employed *Toward* as their agent about the sale of some property in lots. In 1875 the Defendants conveyed to *Toward* in fee some lots which he purchased from them, and in the following year he mortgaged these lots to the *Bishop Auckland Building Society*. The sale and the mortgage were honest transactions. *Toward* then, in 1877, by a trick induced the Defendants to execute to him a second conveyance of part of the land comprised in the former, which he had mortgaged, so that he got what looked like an independent conveyance of the land comprised in this second deed. This enabled him to cheat the Plaintiffs by mortgaging to them without their having any notice of the mortgage to the *Bishop Auckland Building Society*.

There was no communication between the Plaintiffs and the Defendants, and the Plaintiffs claim through *Toward*. Have they, then, any better right than he? They say that by reason of the doctrine of estoppel they have. First let us look at the reality of the thing. What did the Plaintiffs get by their mortgage from *Toward*? They got all that he could give them, not what they thought he could give them. He had at that time only an equity of redemption, and his mortgage to the Plaintiffs made them second mortgagees. Now, apart from the question of estoppel, the Plaintiffs, as assignees of a mere equity of redemption, have no remedy against the Defendants on their covenants for title, for there is no legal estate with which the covenants could run; so that, apart from estoppel, the Plaintiffs cannot maintain an action on the covenants.

The Plaintiffs rely as an alternative case on the ground that the Defendants by their deed of 1877 untruly represented that they could convey to *Toward*. If the representation had been fraudulent an action might lie; but it is now settled that an action cannot be brought for a misrepresentation which was only negligent and not fraudulent.

Now let us come to the technicalities. The Plaintiffs say, "You, the Defendants, are estopped from saying that you had

not a legal fee which you conveyed to *Toward*; we, therefore, are, as against you, to be taken as having the legal fee, an incident to which is the right to sue you on the covenants for title." Now, I think that *Toward*, having obtained the second conveyance by fraud, could not get an estate by estoppel, though I am not prepared to say that the Defendants could plead *non est factum*—indeed, I do not think that they could. It does not appear that the Defendants were under any mistake as to the contents of the documents which they executed. They knew what they were doing when they executed the deed; but if they had not been deceived they would not have done it. The plea of *non est factum*, therefore, could not in my opinion be sustained. But it is urged that if *Toward* had brought an action on the covenants for title he must have failed, since he had obtained the conveyance by fraud, and that the Plaintiffs are in no better position. If the Defendants were seeking equitable relief against the Plaintiffs, they could plead purchase for value without notice; but the Defendants are not seeking relief. I do not remember any case at law where replication of purchase for value without notice has been held a good answer to a plea of fraud, wherefore I am not prepared to say that, assuming an estoppel to exist, the Plaintiffs could maintain an action on the covenants which *Toward* himself could not have maintained.

There is no estoppel which prevents the Defendants from denying that they conveyed the fee to *Toward* by the deed of 1877. Looking carefully at the cases, especially *Right* v. *Bucknell* (1), *Heath* v. *Crealock* (2), and *General Finance, Mortgage and Discount Company* v. *Liberator Permanent Benefit Building Society* (3), I think that there is not in the deed of the 4th of April, 1877, any such averment that the vendors were seised in fee as would estop them. It is settled that a grant of land with covenants for title does not estop, and in the present deed, though the recitals lead to the inference that the vendors were seised in fee, they do not state that they were. The late Master of the Rolls said that it was not desirable to extend a doctrine by which falsehood was made to have the effect of truth; and I

(1) 2 B. & Ad. 278. (2) Law Rep. 10 Ch. 22.
(3) 10 Ch. D. 15.

C. A. 1892 ONWARD BUILDING SOCIETY v. SMITHSON. Lindley, L.J.

think it ought not to be extended by drawing inferences from language which is not clear. Estoppel is a rule of evidence which prevents a man from saying what is true. Here the Plaintiffs took no legal estate by their mortgage; so, in the absence of estoppel, they have nothing to which the covenants for title can attach, and they cannot sue. I am of opinion, therefore, that the action fails, and must be dismissed.

BOWEN, L.J.:—

The Defendants are sued on covenants for title contained in a conveyance executed by them to *Toward*. *Toward* was guilty of fraud, and if it was the case of an ordinary covenant the Plaintiffs could have no better right than *Toward*. The answer to that is ingenious, that, though the Defendants could have set aside this deed for fraud, it was voidable only and not void (to which extent I think they are correct), and that, not having been avoided, it operated to create an estate by estoppel, and that the covenants for title run for the benefit of the persons into whose hands that estate passed. That depends on there being an estate by estoppel, and it is upon the broad ground that there is no such estate that this case must be decided. The law of estoppel by deed is as old as the hills; an estoppel can only be effected by what is express and clear—by a statement by which the parties mean to bind themselves in making their contract. I need not read again the observations in *Right* v. *Bucknell* (1), to the effect that estoppel can only be by what is clear and precise. This rule is not a mere technical rule, but is of great importance. It would be very dangerous to extract a proposition by inference from the statements of a deed, and hold the party estopped from denying it; estoppel can only arise from a clear, definite statement. For instance, it is not enough to say that a vendor is well entitled in fee at law or in equity; he cannot be estopped from denying that he had the legal estate unless there is an express statement in the deed that he has it. In the present case there is an omission in the deed, so that it falls short of saying that the vendors have the legal fee; it may have been an accidental omission; but what right have we to supply it? The

(1) 2 B. & Ad. 278.

recitals in the deed are strictly true; why should we supplement them by inserting, as an inference from them, a statement which is not true?

The question whether a *bonâ fide* purchaser for value can bring an action on covenants for title entered into with his vendor by a former owner, in a conveyance which was obtained by fraud, not of such a nature as to support a plea of *non est factum*, and so take advantage of the fraud, is new and important, and I prefer to leave that question open, as it is not necessary for the decision of the present case, which must be decided on the ground that as there is no estoppel the Plaintiffs cannot sue.

I concur with Lord Justice *Lindley* in expressing our obligation for the brilliant argument of Mr. *Scott Fox*.

A. L. SMITH, L.J.:—

I also thank Mr. *Scott Fox* for his able argument.

Mr. *Warmington's* argument has satisfied me that the Defendants could not shelter themselves under a plea of *non est factum*, for they intended to execute a deed containing what this deed did contain, though they were induced to execute it by a fraudulent concealment of the fact that it related to land which they had already conveyed.

I do not intend to bind myself on the question whether, supposing there had been an estoppel, the Defendants could have successfully defended this action on the ground that they were induced by fraud to execute the conveyance. It is unnecessary to decide the point, and I do not. I decide this case on the ground that there is no statement in the deed sufficiently distinct to create the estoppel alleged by the Plaintiffs. An inference can be drawn from the deed that the Defendants were owners in fee; but inference is not enough to create an estoppel; there must be a distinct, positive statement of the fact which is relied on as creating it.

Solicitors: *Iliffe, Henley, & Sweet; Bridges & Co.*, agents for *Hugh, Dunn, & Watson, Darlington.*

H. C. J.

C. A.
1892
Oct. 26, 27; Nov. 7.

LONDON AND NORTH WESTERN RAILWAY COMPANY *v.* EVANS.

[1887 L. 76.]

Canal—Right of Navigation—Subjacent Mines—Right of Support.

By a private Act of Geo. 2, the undertakers, who were not made a corporation, were authorized to make an existing brook navigable, and to maintain and use such navigation, and to make such new cuts and canals as might be necessary for the purpose, the undertakers first giving satisfaction to the owners of lands which should be made use of, or prejudiced, or damaged, by the carrying on, effecting, or preserving the navigation, which satisfaction might be by a yearly payment or by a sum in gross. The undertakers were authorized to charge tolls for the use of the navigation, and the public were to have a right to use it on payment of the tolls. No express power to purchase land was given, but persons under disability were empowered to sell. The Act contained no reference to minerals. The brook was made into a canal, but no conveyances to the undertakers were made—compensation being made to landowners by annual payments. The navigation subsequently became vested in the Plaintiffs. The Defendants, who were owners of coal under the canal, worked it so as to cause a subsidence, and the Plaintiffs brought their action for an injunction on the ground that they had a right to support:—

Held, by *Kekewich*, J., that the grant of a right to make and maintain the navigation without any grant of the land, did not carry with it a right of support so as to prevent the landowners from working their mines:

Held, on appeal, that where an express statutory right is given to make and maintain something requiring support, the statute, in the absence of a controlling context, must be taken to mean that the right of support shall accompany the right to make and maintain—that if the Act does not provide any means of obtaining compensation for the loss occasioned to the landowner by his having to leave support, this is a strong argument against the Legislature having intended to give such right; but that if it contains provisions under which compensation can be obtained, it needs a strong context to shew that the right to support is not given—that under the Act in the present case compensation could have been successfully claimed for the damage occasioned to the landowners by making their mines unworkable—that the Legislature, therefore, must be taken to have intended to give a right of support, and that the Plaintiffs were entitled to an injunction.

THIS was an appeal by the Plaintiffs from a decision of Mr. Justice *Kekewich* (1).

(1) [1892] 2 Ch. 432.

By a private Act of 1754 (28 Geo. 2, c. viii.), reciting to the effect that *Sankey Brook*, in *Lancashire*, from the point where it entered the *Mersey*, could be made navigable up its stream and three several branches thereof, and that the making it navigable would be a public benefit, five persons therein named and thereby appointed "undertakers," their heirs and assigns, were, by sect. 1, "authorized and empowered at their proper costs and charges, to make the said river or brook called *Sankey Brook* navigable, portable, and passable for boats, flats, and other vessels from the said river *Mersey* below *Sankey Bridge* up the said river or brook and the said three several branches, and from time to time to continue, maintain, and use such navigation in such manner as they shall think fit"; and for that purpose to clear, open, scour, enlarge, or straiten the brook and its said branches, or any other streams, brooks, or watercourses which came or might be brought into the same, and to dig the banks of the brook or of any other watercourses aforesaid, for bringing water into the brook, "and to make such new cuts, canals, trenches, or passages for water in, upon, or through the lands or grounds adjoining or near unto the same river or the three several branches aforesaid, or such streams, brooks, or watercourses as aforesaid, or any of them, as they shall think proper and requisite" for the navigation, or for the more convenient carrying on the undertaking; and to remove obstructions to the navigation, and to erect on the brook or its branches, and the other watercourses, or the lands adjoining to or near the same, such bridges, sluices, locks, &c., and other works, as the undertakers, their heirs, assigns, or nominees should think requisite and convenient, and also among other powers, "to dig, take, and carry away soil, clay, gravel, or stone proper, requisite, and convenient for carrying on the said works and undertaking, in or from any grounds of any person or persons adjoining or lying contiguous to the said river or brook (not being a house, garden, orchard, yard, park, paddock, planted walk or avenue to a house)" . . . .; "the said undertakers, their heirs and assigns, doing as little damage as may be in the premises, and first giving satisfaction to the owners or proprietors of such lands, tenements, tithes, or hereditaments respectively as shall be digged, cut, removed, or otherwise made use of, or that

C. A. 1892

LONDON AND NORTH WESTERN RAILWAY CO. v. EVANS.

in anywise shall be diminished, prejudiced, or damaged by or for the carrying on, effecting, or preserving the said navigation, or for maintaining or managing the same as the commissioners hereinafter named or their successors, or any seven or more of them, shall for that purpose order, adjudge, direct, and appoint, according to the true intent and meaning of this Act, in case the said undertakers, their heirs or assigns, shall not otherwise agree with the proprietors of such lands, tenements, or hereditaments respectively concerning the same."

By sect. 3, a large body of commissioners was appointed, to whom authority was given "to interpose and mediate between the said undertakers, their heirs, assigns, and nominees, and the owners and occupiers of such lands, tenements, and hereditaments adjoining to or near the same river or brook, branches, streams, or watercourses as shall be intended to be cut, damaged, or made use of for the carrying on or effecting the undertaking aforesaid, and to settle and determine what satisfaction either by an annual rent or payment, or by a sum of money in gross, every person or persons, bodies politic or corporate respectively, shall have for such part, share, or proportion of his, her, or their lands, tenements, tithes, or hereditaments as shall be cut, dug, removed, or made use of as aforesaid, and for the damage that shall be thereby sustained"; and directions were given as to their course of proceeding.

Sect. 12 empowered the undertakers, their heirs, assigns, and nominees, to charge a toll of 10*d.* per ton for all goods carried on the navigations, with some specified exceptions.

Sect. 15 enacted that it should be lawful for all husbands, guardians, trustees, committees, executors, or administrators for and on behalf of their *cestuis que trust*, whether infants or issue unborn, lunatics, idiots, or *femes covert*, and for all and every other persons and person whatsoever who should be seised or possessed of or interested in any lands, tenements, or hereditaments which might be proper and convenient for and facilitate the carrying on and effecting the intended navigation, to demise to the undertaking any of such lands, tenements or hereditaments, or to sell to them the fee simple, subject to or charged with such perpetual yearly rent as the commissioners should adjudge to

be an equivalent for the clear yearly rent of the premises, such rent to be charged upon and reserved out of the premises leased or sold, and the tolls and duties received under the Act.

By sect. 25 the undertakers were required to secure the adjacent lands from being flooded, and if they should make any new cuts, canals or trenches under their powers, then they were to erect and maintain such sufficient bridges or passages for the accommodation of the landowners as the commissioners should direct.

By sect. 26 it was provided that if, at any time after the work had been entered upon or after its completion, any person should sustain any damage to his land by the raising of the water to an unusual height, or by turning, diverting, or lowering the stream, or by not efficiently making up the banks, or by not cleansing the stream, "or by any means not hereby before otherwise provided for," the compensation should be settled by the commissioners or a jury.

Sect. 29 imposed a penalty on the undertakers if they failed to keep the bridges in repair.

By sect. 35 it was enacted that the river or brook, and its branches, cuts, and canals should be an open, common and navigable river, and that all persons should be at liberty to navigate it on paying the tolls authorized by the Act.

By sect. 36 it was provided that if the work was not completed by the 29th of September, 1766, the commissioners might appoint other persons to do it, and that on their appointment they should have the same powers as were given to the original undertakers, and that the powers of the original undertakers should determine.

Sect. 53 recited that the making the brook navigable would, amongst other advantages to the public, be a means of supplying with coal the borough and town of *Liverpool*, and other places within the port of *Liverpool*, much better than they were then supplied, and it then proceeded to make some regulations as to the sale of the coal conveyed by the navigation.

The undertaking was completed. No land was purchased and conveyed to the undertakers. Shortly after the passing of the Act, annual payments began to be made to the owners or occupiers

C. A. 1892

LONDON AND NORTH WESTERN RAILWAY CO. v. EVANS.

of the lands of which portions were used for the purposes of the navigation, and they had been continued up to the time of this litigation. They appeared to have been assessed solely with regard to the surface value of the lands used, and after a time they settled down into fixed payments.

For nearly forty years before the present litigation, coal had been gotten under parts of the canal, and subsidences had taken place from time to time. There were many of five or six feet vertically, and one of eighteen feet in twelve months. All of them were repaired, and the traffic on the canal was seldom stopped by them. The repairs were always done at the expense of the owners of the navigation.

The present action was brought by the *London and North Western Railway Company*, in whom the *Sankey* Navigation had become vested, to restrain the Defendants from working coal under part of the lands over which the canal passed, so as to cause damage or injury to the canal.

The engineer of the Defendants estimated the value of the coal which would have to be left under the land in question, if perfect support for the canal was to be left, at £144,000, and the outside expense of all repairs of the canal that would be needed if the coal were worked out, at £5500.

Mr. Justice *Kekewich* held that the Plaintiffs were not entitled to support, and dismissed the action.

Sir *H. James*, Q.C., *Cozens-Hardy*, Q.C., and *Clare*, for the appeal:—

The Act gives the undertakers power to construct the navigation, and we say that this gives an implied right to support, as otherwise the power to construct would be nugatory. There is nothing to shew whether at the time of the opening of the navigation any value was attached to the minerals. The question is, what the undertakers were entitled to take when they entered on the lands, and what they did take. The case was partly treated below as depending on common law right to support; but that argument can only be used by way of analogy. We are not owners of the land, but have only rights over it. The question is, upon the Act, what did the Legislature intend those rights to

be? It cannot have been intended to give the undertakers merely a surface right to make a canal, leaving the landowners at liberty to let it down by removing the minerals as soon as it was completed. The case is similar to a right of way; if you grant a right of way, you cannot let down the ground over which it is granted; and this case stands on a higher footing, for in the case of a right of way there is a mere grant of right to pass; here there is a right to make and maintain a structure on the land. We are not trespassers; and if there has been a failure as to compensation, we do not lose the statutory right to maintain the works. The landowners might have stopped the works in 1874 if they were not properly compensated; and if they have any claim to compensation which they can enforce now, letting down our canal, which is a public highway, is not the proper means of enforcing it.

Now, as to the authorities. In *Benfieldside Local Board* v. *Consett Iron Company* (1) the Bishop of *Durham* was entitled to mines under a moor. Commissioners were directed by Act of Parliament to lay out highways over the moor, the mines and minerals being reserved to the Bishop as lord of the manor, with right to work them without paying any damages or making satisfaction. It was held that the lord could not work the mines so as to destroy the roads. This case shews that if a highway comes into existence, even with a provision that the mine-owner may work his mines without making compensation, that does not enable him to destroy the public right. The Solicitor-General, in the Court below, relied on some other cases. The first was *Consett Waterworks Company* v. *Ritson* (2). That case turned on an express reservation of mines with a power to work them given in such terms that the Court of Appeal came to the conclusion that it could only be construed as authorizing the mine-owner to work, though by so doing he let down the surface. There is nothing analogous in the present case. The next case, we say, is in our favour—*In re Corporation of Dudley* (3), which related to a sewer constructed under the authority of the *Public Health Act*, 1875. The statute gave no express right to support; but the Court of

(1) 3 Ex. D. 54.

(2) 22 Q. B. D. 318, 702.

(3) 8 Q. B. D. 86, 93.

C. A. 1892 — LONDON AND NORTH WESTERN RAILWAY CO. v. EVANS.

Appeal held it to be implied on the ground stated by the present Master of the Rolls, "That where the Legislature gives power to a public body to do anything of a public character, the Legislature means also to give to the public body all rights, without which the power would become wholly unavailable, although such a meaning cannot be implied in relation to circumstances arising accidentally only"; and Lord Justice *Lindley* in his judgment says that, *primâ facie*, the local authority acquired a right to support of their sewer, and that such right accrued at the time the sewer was constructed. There is one distinction between that case and the present, that the local authority were bound to make the sewer; but the judgments are not founded on that. The case of *Caledonian Railway Company* v. *Sprot* (1) shews the position of a grantee of land where the grantor has reserved the minerals. The *Metropolitan Board of Works* v. *Metropolitan Railway Company* (2) was referred to by the Defendants as in their favour; but it has really no bearing on the present case. It was held that the plaintiffs were not entitled to lateral support for their sewer from adjacent land whose owners were not within the compensation clause. The Act does not in express terms impose an obligation to keep up the canal as a canal; but there is an obligation to keep up bridges and to maintain the banks when made, and to keep up floodgates. It will be said that the case is a hard one, because the landowner gets no compensation for his mines. The same argument was used in *Caledonian Railway Company* v. *Sprot* and the answer is the same as in that case, that the landowner was not bound to allow the work to be done on his land until he was compensated for all damage, direct or consequential. It is at this distance of time to be presumed that all proper compensation was made, for the making compensation was a condition precedent to using the lands. It was urged below that as the Act throws the duty of repairing the canal on the undertakers, they must repair at their own expense the damage done by the mine-owners; but the same argument was unsuccessfully urged in *Benfieldside Local Board* v. *Consett Iron Company* (3). The case of *Metropolitan Board of Works* v. *Metro-*

(1) 2 Macq. 449.
(2) Law Rep. 3 C. P. 612; 4 C. P. 192.
(3) 3 Ex. D. 54.

politan Railway Company (1) is explained in *Roderick* v. *Aston Local Board* (2).

Rigby, S.-G., *Renshaw*, Q.C., and *Warrington*, for the Respondents:—

The question is whether the course of practice followed for 150 years—that the undertakers should maintain the canal at their own expense—is to be altered. Until the railway company came into possession of the undertaking no one doubted that they were obliged to maintain it, and had no right to the support of the minerals. The effect of the Plaintiffs' contention is that we must leave ungotten coal of the value of nearly £150,000, and the evidence shews that if all the coal was got out the canal could be repaired at an expense of less than £6000. Now there is not a word in the Act about support by minerals. Liberty is given to the undertakers to use the land, that is, to dig upon it, to take gravel from it, to lay refuse upon it and so forth, and it is for this kind of user that compensation is provided. The question of minerals was not in any one's mind when the Act was passed—its scope is merely to legalize what would otherwise be a trespass, and to give compensation for the damage done by it. All the compensation that has ever been paid was compensation for surface damage.

[BOWEN, L.J.:—Surely the Legislature must have intended to give the undertakers something more than a license to make a canal which the landowners could destroy the next day.]

It would be illegal, no doubt, to do any act on the surface which would destroy the canal; it would be illegal to destroy it from below wilfully and maliciously; but we say that it is not illegal to work the minerals below in the ordinary course of working, though it may injure the canal. Destroying the canal by working the mines is out of the question: it clearly appears that no working of them would destroy the canal, it would only cause some extra expense in keeping it up. Just at the commencement of the works an agreement was made between the undertakers and Mr. *Legh* and his tenants, as to assessing

(1) Law Rep. 3 C. P. 612; 4 C. P. 192. (2) 5 Ch. D. 328, 332.

C. A. 1892 — LONDON AND NORTH WESTERN RAILWAY CO. v. EVANS.

compensation, and we find it was assessed by the undertakers paying a suitable proportion of the rent of the lands, portions of which were made useless to the occupiers by the navigation. In the present case the promoters had no estate in the land under the original Act, *Hollis* v. *Goldfinch* (1); and the subsequent Acts go on the same lines. The ownership of the soil remained as it was before, subject to certain rights given to the navigation. That distinguishes the case from all those in which there was a severance of ownership between the surface land and the underlying part, as for instance, *In re Corporation of Dudley* (2), where *Cotton*, L.J. (3), rests his judgment on ownership. In *Benfieldside Local Board* v. *Consett Iron Company* (4), the rights of the Bishop by the terms of the Act extended only over the lands allotted, and as the highways were taken out before allotment, the Bishop's rights did not extend to them. Then, in the *Metropolitan Board of Works* v. *Metropolitan Railway Company* (5), though the Act under which the plaintiffs made their sewer authorized them to make it, and lateral support was under ordinary circumstances essential to it, they were held not entitled to lateral support.

[BOWEN, L.J.:—The Court of first instance went on the ground that the sewer might be made so as not to require lateral support, and that therefore lateral support did not appear to be reasonably necessary in order to enable the Act to be carried out, and the judgment on appeal is consistent with that. The case is put on that ground in *Roderick* v. *Aston Local Board* (6).]

Where a man dedicates land for a highway he does not prevent himself from working the coal under it; it would be lamentable if he did. We do not find any case in which any one has been indicted for causing subsidence of a highway by mining operations. It is not for the benefit of any one that a highway should be left standing on a ridge; it is much better that it should be let down along with the adjoining ground.

[BOWEN, L.J.:—The authorities are clear that if land is granted

(1) 1 B. & C. 205.
(2) 8 Q. B. D. 86.
(3) Ibid. 95.
(4) 3 Ex. D. 54.
(5) Law Rep. 3 C. P. 612; 4 C. P. 192.
(6) 5 Ch. D. 328.

for the express purpose of some particular work, that carries the implied right of such support as is necessary for maintaining the work. I think that this is a part of a wider proposition, that if you grant anything you grant the necessary means of enjoying it. If a grant is given to construct on land works which require support, is not the right of support given by implication: and where an express right is given by statute to construct works which require support, is not such a right of support given as is necessary for the maintenance of the works, unless the context shews the contrary?]

Such a right only of support as, having regard to the circumstances of the case and to what was in the contemplation of the Legislature, is reasonable. At the time of the passing of the Act nobody thought about minerals; there is no prohibition of taking them away, and the promoters took their chance. The taking the minerals away does not prevent their keeping up the canal, though it increases somewhat the expense of doing so. The object of the Act is, therefore, not defeated by our contention.

Sir *H. James*, in reply:—

The usage up to the present time cannot control the rights of the parties, which must depend on the Act of 1754. The usage cannot be looked to in construing that Act; this would be allowing private individuals to decide on the meaning of an Act of Parliament. The Respondents say that their works cause no subsidence that cannot easily be repaired, but their arguments would justify the total destruction of the canal by mining. They do not give any answer to the suggestion of the Court that a license to make works requiring support carries with it a right to support, and they are driven to contend that the day after the canal was completed the mine-owners could have destroyed it by working out their coal. It lies on the landowner to shew that the right of support which is implied by the license is taken away. Everything which is necessary to support the water in the canal is "made use of" within the meaning of the Act. If, instead of merely claiming surface value, the landowner had said: "The working of my mines will be interfered with, and you

C. A. 1892 LONDON AND NORTH WESTERN RAILWAY CO. v. EVANS.

must compensate me for that," such a claim could not have been resisted. In *In re Corporation of Dudley* (1) a clause of compensation was held to apply to coal, and it was not so strong a compensation clause as the present. It is said the landowners were never compensated for being prevented from taking the coal, but the reply is as in *Caledonian Railway Company* v. *Sprot* (2), that if a landowner could object to the work being done, unless he was paid all the compensation he was entitled to in respect of his mines, as well as the surface, it is his own fault if he confined his claim for compensation to surface damage.

1892. Nov. 7. LINDLEY, L.J.:—

I have had the opportunity of reading the written judgments of my learned Brethren, and shall only say that I concur in them.

BOWEN, L.J.:—

The Plaintiffs, the *London and North Western Railway Company*, have succeeded to the ownership of the *St. Helen's Canal* and to the rights and liabilities of its original proprietors under an old Act of Parliament passed in the year 1754. The Defendants are lessees and occupiers of coal mines in the subjacent and adjacent lands over which a branch of the canal has been constructed, and, in the ordinary course of working their coal, are endangering this branch. Thereupon the *London and North Western Railway Company* ask for an injunction to restrain the Defendants from so working their mines as to cause damage to the canal.

The Plaintiffs contend that, together with an express right to make and to maintain their canal, the Act of 1754 conferred on them by implication the right to such support as was necessary for the existence of the canal and its branches. The right to make the canal, they argue, was subject to the condition precedent of their making compensation to the owners of the lands taken or used for the purposes of the canal. Such compensation, they urge, was paid to the predecessors in title of the Defen-

(1) 8 Q. B. D. 86, 87. (2) 2 Macq. 449.

dants; and, thereupon, the necessary right of the support requisite for the due maintenance of the canal was acquired. The Defendants, on the other hand, allege that the compensation so paid was in respect only of the actual lands taken, but nothing was paid for minerals, and that, if the Plaintiffs succeed in their present claim, the Defendants, as owners of the minerals, will have been prevented from using in a legitimate and ordinary manner what still is their own property. How far the predecessors in title actually received compensation is a question that will hereafter be examined in the judgments to be delivered. Meanwhile, it is desirable clearly to state the point of view from which the construction of the Act of Parliament, upon which the question in this case mainly turns, ought to be approached.

In dealing with an ordinary grant of lands it is undoubted law that, where such a grant is made for a specific purpose, such as the construction on the lands of a house, canal, railway, or other permanent work, the grant, in the absence of a contrary intention appearing on its face, carries with it by implication the right of reasonable and necessary support for the works so to be erected from the subjacent or adjacent lands of the grantor. This maxim of law and of good sense applies whether the grant is voluntary or under the compulsory powers of a statute: see *Elliot* v. *North-Eastern Railway Company* (1); *Caledonian Railway Company* v. *Sprot* (2).

When we pass from private grants between individuals to titles and rights created by an Act of Parliament, the exact subject-matter is altered, but similar rules of good sense and law obtain when we have to interpret sections which do not expressly decide the matter. These canons do not override the language of a statute where the language is clear; they are only guides to enable us to understand what is inferential. In each case the Act of Parliament is all-powerful, and, when its meaning is unequivocally expressed, the necessity for rules of construction disappears and reaches its vanishing point. Where the intention of the Legislature has been left to be collected from principles of reason, there are one or two obvious principles which have to be borne in mind. One such maxim, similar to

(1) 10 H. L. C. 333, 357. (2) 2 Macq. 450.

C. A.
1892
LONDON AND NORTH WESTERN RAILWAY CO. v. EVANS.
Bowen, L.J.

that which has been alluded to as governing the case of private grants, seems obvious also with regard to Acts of Parliament. Where an express statutory right is given to make and maintain a thing necessarily requiring support, the statute, in the absence of a context implying the contrary, must be taken to mean that the right to necessary support of the thing constructed shall accompany the right to make and to maintain it. More especially would this seem reasonable when the thing to be constructed is one of public advantage and utility, in which the public are to have rights. The maxim of good sense and law so stated becomes applicable with more or less stringency according to the scope of the Act of Parliament. On the other hand, the Legislature cannot fairly be supposed to intend, in the absence of clear words shewing such intention, that one man's property shall be confiscated for the benefit of others, or of the public, without any compensation being provided for him in respect of what is taken compulsorily from him. Parliament in its omnipotence can, of course, override or disregard this ordinary principle as it can override the former, if it sees fit to do so, but it is not likely that it will be found disregarding it, without plain expressions of such a purpose. These two maxims or principles appear to bear on the construction of statutes like the present, and may be called canons of construction, not because they are inflexible doctrines, but because they are doctrines of sound sense and obvious justice, to be borne in mind in dealing with legislation, which cannot be supposed, unless it so explicitly states, to neglect what is reasonable and business like on the one hand, or what is natural justice upon the other. It is evident that when both a right to make and maintain a work necessarily requiring support is given, and a mode of compensation also is provided for those whose lands will have to furnish such support, the two maxims work in harmony with, and are not drawn into conflict with, one another. The reasons for supposing, in the absence of a controlling context, that the Act designed the right of necessary support to be enjoyed seem in such a case to become overwhelming. When no right of compensation is furnished by the Act the case is different. The two maxims then appear to draw us in different directions, and

their antinomies have to be adjusted by a careful examination of the statute itself. It is by the light of these two principles when they coincide in favour of one view of the statute, by their adjustment and reconciliation when they appear to conflict, that various cases have been decided, falling on one side or the other of the line, according to differences in the statutes which have to be construed; such cases, for instance, as *Metropolitan Board of Works* v. *Metropolitan Railway Company* (1), as explained by Sir *G. Jessel*, M.R., in *Roderick* v. *Aston Local Board* (2), *In re Corporation of Dudley* (3), and in *Benfieldside Local Board* v. *Consett Iron Company* (4). If in the present case compensation for the right of support has been in fact provided for by the Act of 1754, the two maxims of good sense, so far from creating a conflict of reasoning, both will operate in favour of the Plaintiffs' claim to the right of support, and the point to be decided upon the present appeal will become reasonably clear. For reasons which have been elaborated by my Brother *A. L. Smith*, with which I agree, and which I will leave to him to state at length, it seems to me that in the present case apt words of compensation for those whose lands would be required for the making and maintenance of the canal are to be found in the statute of 1754. The words "first making satisfaction to the owners of such lands as shall be made use of" ought to be reasonably construed as wide enough to secure such just compensation. It is true that at the date of the Act the minerals were not thought to be of value, and were not taken into account in assessing the actual compensation exacted. But if the right of support was not substantially measured in the price given for the lands taken and used, it might have been demanded and estimated in the price, had the owners been sufficiently prescient; and after this length of time it must be assumed that all was paid for which was capable of calculation or measurement and which was thought worth claiming by the owners, and that all conditions precedent have been fulfilled which were requisite to give the canal proprietors the right to the necessary support for the maintenance

(1) Law Rep. 3 C. P. 612, 623; 4 C. P. 192.
(2) 5 Ch. D. 333.
(3) 8 Q. B. D. 86.
(4) 3 Ex. D. 54.

C. A. 1892

LONDON AND NORTH WESTERN RAILWAY CO. v. EVANS.

and making of their canal. The appeal accordingly ought to succeed, and the injunction to be granted to the Plaintiffs, with costs of the action, both below and in this Court.

A. L. SMITH, L.J.:—

The question to be determined in this case is whether the undertakers, who were empowered by the Act of 28 Geo. 2, c. viii. (1754), to convert *Sankey Brook*, in the county of *Lancaster*, and its branches into a navigable river for the use of the public, and also to make and maintain such new cuts and canals in, upon, and through the lands of owners adjoining as might be proper and requisite for the navigation and carrying out of the contemplated undertaking, acquired the right of subjacent support by virtue of that Act from the lands underneath such new cuts and canals, or whether the landowners possessed of the minerals lying under the cuts and canals are entitled to win them in the ordinary and accustomed manner, even though by so doing they let down the surface and destroy the cuts and canals.

It may be taken, without referring to the Acts passed since the Act of 1754, that, if the undertakers under that Act obtained the right to subjacent support, the present Plaintiffs have also such right.

It is settled law that where minerals are severed from the surface by deed, instrument, or Act of Parliament, the mineral owner is not entitled to let down the surface, unless by the deed, instrument, or Act of Parliament by which the minerals are severed it appears that the surface owner has parted with the right of support. or, in other words, that the mineral owner's right to get the minerals is thereby limited to getting them in such a manner as not to occasion injury to the surface owner. If authority were wanted, the cases of the *Caledonian Railway Company* v. *Sprot* (1); *Bell* v. *Love* (2); and *Davis* v. *Treharne* (3) will suffice. But it is said by the Solicitor-General for the Defendants that, though this may be so, it does not apply to the present case, because, by the Act of 1754, there had been no severance of the surface from the minerals, and in this he is correct, for by the Act no

(1) 2 Macq. 449. (2) 10 Q. B. D. 547, 558.
(3) 6 App. Cas. 460, 466.

property in the surface soil is vested in the Plaintiffs, nor is there any severance of surface at all from the minerals.

It is a correct proposition of law that when an Act of Parliament empowers undertakers to make and maintain works for the benefit of the public upon the land of others, and such works of necessity require the support of the subjacent soil, and the Act provides for compensating the landowners for damages, both to the surface and subjacent minerals, by reason of the execution of the contemplated works, then, unless there be something in the Act to the contrary, a necessary implication arises that the Act gives to the undertakers a right to subjacent support for the works authorized to be constructed and maintained.

In stating this proposition I do not wish to be understood as holding that nothing less than the above will suffice to raise the implication of the right to subjacent support, but this case does not, in my opinion, necessitate an inquiry as to what, if anything less, will suffice. In my judgment, if the conditions above stated are to be found in an Act of Parliament, a necessary implication does arise that the undertakers are entitled to subjacent support for their works as against the mineral owner below.

This proposition appears to be one which is irresistible, for it is impossible to suppose in the premises mentioned that the Legislature contemplated that the mineral owner might let down and destroy the works authorized to be constructed for the benefit of the public.

The case of *In re Corporation of Dudley* (1), before my Brothers *Denman* and *Watkin Williams*, whose decision was affirmed on appeal by this Court, was decided upon this principle. In that case the Corporation of *Dudley* were empowered by the *Public Health Act*, 1875, to construct a sewer through, under, and upon the lands of Earl *Dudley*. By the Act Earl *Dudley* was entitled to claim compensation for damages sustained by him in being deprived of the free power to work his minerals subjacent to the sewer. It was held that, in these circumstances, the Earl was under obligation to preserve to such sewer subjacent support. Mr. Justice *Denman*, in his judgment, said (2): "It appears to me a matter of common sense inference, that where a statute for

(1) 8 Q. B. D. 86. (2) 8 Q. B. D. 90.

C. A. 1892

LONDON AND NORTH WESTERN RAILWAY CO. v. EVANS.

A. L. Smith, L.J.

the public benefit gives such a power as this to persons laying down such things as sewers, it must at the same time give them a right not to be undermined by persons having minerals underneath." It must be remembered that in that case the right to compensation was given to the mineral owner, and Mr. Justice *Denman* had this in his mind when he made the statement above. The case of the *Benfieldside Local Board* v. *Consett Iron Company* (1) was decided upon similar grounds.

The question next for consideration is: Does the Act of 1754 contain the conditions above stated? The Act not only empowers the undertakers to make and maintain the cuts and canals for the benefit of the public, but, by sects. 25 and 29, it enacts that they shall erect and maintain sufficient bridges over the cuts and canals as the commissioners shall direct. It enacts (sect. 35), that the brook, cuts, and canals shall for ever after the passing of the Act, be an open, common, and navigable river for all the King's people, upon payment of tolls; and sect. 53 points definitively to some of the public advantages likely to arise from the undertaking.

It is manifest that the cuts, canals, and other works contemplated by the Act of necessity required, and cannot be maintained without, the support of the subjacent soil, and sect. 1 of the Act provides for compensating landowners in the following terms:—"The said undertakers, their heirs and assigns, doing as little damage as may be in the premises, and first giving satisfaction to the owners or proprietors of such lands, tenements, tithes, or hereditaments respectively as shall be digged, cut, removed, or otherwise made use of, or that in anywise shall be diminished, prejudiced, or damaged by or for the carrying on, effecting, or preserving the said navigation, or for maintaining or managing the same" as the commissioners shall adjudge. By sect. 3 the commissioners were to settle and determine what satisfaction, either by an annual rent or payment, or by a sum of money in gross, every person should have for such part of their lands, tenements, tithes, or hereditaments as should be cut, dug, removed, or made use of, and in certain cases a jury was to be summoned to assess such damages and recompense

(1) 3 Ex. D. 54.

to be awarded to the owners and occupiers of such lands, tenements, tithes, or hereditaments as should be used for, or damnified by, or by means of the said intended navigation or works.

It seems impossible to hold, as the Solicitor-General invited us to do, that this right to compensation was limited to surface damage, and I cannot doubt that, if on or about the date of the construction of the works it had been thought worth while to make a claim for loss thereafter to be suffered by the landowner by being deprived of the right of removing minerals in the same way he would have been able to do without the works, such a claim ought to have been received and adjudicated upon under the provisions for compensation above set forth. It is true that the claim which the landowners and occupiers then made appears to be for surface damage only, and that payment for such has been continued down to the present time, but that fact does not establish that the compensation clauses did not confer upon the landowner the right to be compensated for damage about to be done to the value of his minerals, if any, or that the clauses ought not, consequently, to be read in the way their language imports. The Solicitor-General urged that the canal proprietors had always heretofore mended the canal and its banks when subsidences occurred; but Sir *H. James* stated that since 1877, when the subsidences began to be serious, the mendings had always been done under protest, and that now the point was brought up for adjudication. The case of *Metropolitan Board of Works* v. *Metropolitan Railway Company* (1), on appeal, was cited as an authority against the Plaintiffs' right to subjacent support, but when the facts of that case are ascertained it will be seen that, in the first place, the sewer could have been constructed without the lateral support which was there claimed, and that there was no right to compensation given to the person against whom the lateral support was claimed. Sir *G. Jessel* points this out in the case of *Roderick* v. *Aston Local Board* (2). In my judgment the requisites necessary to support the proposition of law above stated are proved to exist in this case, and the Plaintiffs are entitled to the relief sought, and this appeal must be

(1) Law Rep. 4 C. P. 192. (2) 5 Ch. D. 332.

C. A. 1892 LONDON AND NORTH WESTERN RAILWAY CO. v. EVANS.

allowed. The Plaintiffs are entitled to the agreed damages, £900, and to an injunction restraining the Defendants from working so as to injure the Plaintiffs' canal, and to the costs of the appeal, and in the Court below.

Solicitors: *Patersons, Snow, Bloxam & Kinder,* agents for *W. H. Brook, Warrington; C. H. Mason.*

H. C. J.

SCHAUER *v.* J. C. & J. FIELD, LIMITED.

CHITTY, J.

1892

March 25, 29, 30; *Oct.* 26, 27; *Nov.* 2.

[1892 S. 595.]

Copyright—International Copyright Act, 1886 (49 & 50 *Vict. c.* 33), *s.* 6—*Application of, to existing works—Saving of Rights and Interests previously acquired—Interest from or in connection with lawful Production—Trade-mark—Interest in Advertising—Subsisting and valuable Interests—Artistic Work first produced in Foreign Country.*

The Plaintiff, a German, claimed to have the photographic copyright in an oil-painting called "*Lisette*," produced in Germany before December, 1885, and also the copyright in a photograph of "*Lisette*" as a distinct work of art.

In January, 1887, the Defendants registered as their trade-mark for candles, a photograph of "*Lisette*" on a small scale, with their name and the words "trade-mark" across the picture. This trade-mark was extensively used by the Defendants on their goods; it was also reproduced by them in various sizes and colours by chromolithography on show cards and trade lists for the purposes of advertisement.

In December, 1887, an Order in Council, extending the benefit of the *International Copyright Act*, 1886, to *Germany*, came into operation, and in January, 1892, the Plaintiff registered himself as the owner of the aforesaid copyrights in *England*, and then sought to restrain the Defendants from infringing his copyright by continuing the use of these show cards, admittedly produced subsequently to December, 1887.

Held, that the Defendants, as the proprietors of the trade-mark, a work lawfully produced before December, 1887, had an interest in advertising it, as they had done, by means of the show cards and trade lists: that this was an interest arising from or in connection with the trade-mark itself, which was subsisting and valuable at the date of the publication of the Order in Council, and that the Defendants were consequently protected by the proviso in sect. 6 of the *International Copyright Act*, 1886, and that it was not material to consider the date at which these show cards were produced; neither was it material that there was a trifling difference between the show cards and the trade-mark, so long as the substance of the trade-mark had, as here, been honestly advertised.

Moul v. *Groenings* (1) explained and applied.

Motion.

The Plaintiff *Schauer*, a member of a firm of art publishers resident in *Berlin*, claimed copyright in an oil-painting, produced in *Germany* before the 20th of December, 1885, by an artist

(1) [1891] 2 Q. B. 443.

CHITTY, J. 1892 SCHAUER v. J. C. & J. FIELD, LIMITED.

named *George Hom*, entitled "*Lisette*," representing the half-length figure of a girl in a mob cap, laughing, with a candle in her left hand, shielding with her right hand the light, which was reflected over her face and bust. The nature of the copyright claimed by the Plaintiff, as appeared from the two entries caused to be made by him in the register at *Stationers' Hall*, on the 19th of January, 1892, was, first, for the copyright in the oil-painting so far as regards the right to reproduce by photographic processes, and secondly, for the copyright in a distinct work of art, *viz.*, a photograph from the oil-painting produced by one *Carl Quiddi*, of *Berlin*.

In January, 1887, Messrs. *Field & Co.*, candle manufacturers, the predecessors in business of the Defendant company *J. C. & J. Field, Limited*, applied under the *Trade Marks Act* to register in class 47, for candles of all descriptions, the following trade-mark: a photograph on a small scale of "*Lisette*," with the words "*Trade Mark*" across the girl's figure, below the waist, and with the words "*Field's Candles*" outside the girl's head. It was admitted that this trade-mark had probably been taken from *Quiddi's* photograph of "*Lisette*," or a reproduction of it; it was also admitted that at this time the Plaintiff had no copyright in *England*. This trade-mark was, in November, 1887, assigned to the Defendant company with the goodwill of the business, and the Defendant company appeared on the register as the proprietors of the mark. The Defendant company's business was a very extensive one, and this trade-mark, which had been largely used on the various goods manufactured and sent out by them, was alleged to be a very valuable one. In their user of this trade-mark, the Defendant company reproduced it in various sizes and colours, the means employed being chromolithography, not photography. This trade-mark was also placed upon the price lists, and was reproduced upon a larger scale in colours on show cards, which were sent round by the Defendant company to their customers for the purpose of advertising their goods. These show-cards, which were of considerable artistic merit, were produced by chromolithography, and usually consisted of a black disc, containing in the centre an enlarged and coloured reproduction of the girl as represented in the trade-mark. On this

disc, but outside the girl's figure, were the words "*Ozokerit Candles*," and the name of the Defendant company in conspicuous white letters. The words "*Trade Mark*" across the girl's figure were not reproduced on these show cards.

In November, 1887, an Order in Council was made under the *International Copyright Act*, 1886 (49 & 50 Vict. c. 33), and published on the 2nd of December, 1887, by which that Act became applicable, amongst others, to German subjects as from the 6th of December, 1887.

The majority of the show cards circulated by the Defendant company for the purpose of advertising their goods had been produced subsequently to the 6th of December, 1887; and the Plaintiff, alleging that they were an infringement of his copyright, commenced the present action in February, 1892, and by the writ claimed an injunction to restrain the Defendant company from printing, publishing, multiplying, selling, or distributing any copies or colourable imitations of his copyright work "*Lisette*," and for the delivering up of all blocks and copies of the copyright work in the Defendant company's possession. The Plaintiff now applied for an *interim* injunction in the terms of his writ. The Plaintiff, by way of shewing what could be done with the show cards as works of art, had framed one of them, with a mount, which cut off the words "*Ozokerit Candles*" and the Defendant company's name, leaving the representation of the girl alone visible in the oval of the mount; the show card thus framed was produced in evidence and made a very pretty picture. The Defendant company, however, maintained that the show cards were not put forward as works of art, but were distributed gratuitously among their customers, to be used solely for the purpose of attracting attention to their goods, with a view to their sale, and in connection with the trade-mark. When the motion was first opened the Plaintiff's counsel contended that they were entitled to an injunction in such terms as would restrain the Defendant company from continuing to use their trade-mark; but this contention was subsequently abandoned, and the relief asked for was confined to the issue and user of the show cards and price lists; the arguments on this last point only are therefore given. The motion also stood over for evidence

CHITTY, J.
1892
SCHAUER
v.
J. C. & J. FIELD, LIMITED.

as to how and when the show cards had been produced, and also to obtain evidence as to German law; but as the motion was eventually decided solely on the effect of the proviso in the 6th section of the *International Copyright Act*, 1886, as applied to the facts above stated, the arguments and cases cited on numerous other questions raised under the *Copyright Acts* are not material for the purposes of this report, and are omitted.

Byrne, Q.C., and *Scrutton*, for the Plaintiff:—

It is admitted that these show cards are the reproduction on a larger scale of the registered trade-mark, which, as registered, is admittedly a small photograph of "*Lisette*," with some added words; the result is an infringement of our copyright, which we are entitled to restrain; the joint effect of the *International Copyright Act*, 1886, sect. 6, and the Order in Council is to put the owner of copyright in a work previously produced, in the same position as if the work had been produced after the Order in Council; as a fact, these show cards were produced after the 6th of December, 1887. The proviso at the end of the *International Copyright Act*, 1886, sect. 6, does not protect the Defendants.

Farwell, Q.C., and *J. Cutler*, for the Defendant company:—

That we have a right to the trade-mark is admitted, we are therefore protected by the proviso at the end of sect. 6 of the Act of 1886, because we have a right or interest arising out of the lawful production of this picture in the United Kingdom, which was subsisting and valuable before the Order in Council was published: *Moul* v. *Groenings* (1). We only use these show cards in connection with our business, and do not set them up as rivals to the Plaintiff's photographs.

[CHITTY, J.:—These show cards do not have the word "*Trade Mark*" across the girl's figure, thereby making these pictures more artistic.]

That is only a detail which is more than compensated by the Defendant company's name and "*Ozokerit Candles*" in conspicuous white letters.

(1) [1891] 2 Q. B. 443.

[CHITTY, J.:—But the show card can be so framed as to cover up these white letters, and so make a pretty picture.]

That may be so, but the Defendants have never done such a thing, and we do not put these cards forward as works of art; they are simply used for the purpose of advertising our goods in connection with our trade-mark. Therefore, if the Plaintiff is within the Act of 1886 at all, which we deny, we are protected by reason of our "rights and interests" in a previous lawful production.

Scrutton, in reply:—

The word "rights" in the proviso to sect. 6 must mean an exclusive right in some particular person, and not a general right, such as a right of advertising: any number of the public might advertise the Defendants' trade-mark: the meaning of the word "interests" is not so extensive as the word "rights," and as would seem from parts of the judgment in *Moul* v. *Groenings* (1), it must mean capital embarked, or something of that kind. For these reasons the Defendant company are not protected by this proviso. Besides, what the Defendant company are advertising by their show cards is not their trade-mark as registered, but something else: the show cards do not contain the words "trade mark."

1892. Nov. 2. CHITTY, J.:—

The Plaintiff's case is founded on his claim to copyright under the *International Copyright Act*, 1886, and the Order in Council made thereunder which was published on the 2nd of December, 1887, and came into operation on the 6th of that month.

During the argument, counsel threading their way, as best they could, through the intricate mazes of the International and other Copyright Acts, raised numerous questions; but in the view I take, the case falls to be decided on a comparatively simple point, viz.: the meaning and effect of the proviso in the 6th section of the *International Copyright Act*, 1886, as applied to the

(1) [1891] 2 Q. B. 443.

CHITTY, J. 1892 SCHAUER v. J. C. & J. FIELD, LIMITED.

material facts, a short statement of which will suffice. [His Lordship then stated the facts and continued:—]

During the greater portion of the argument, the Plaintiff's counsel contended that they were entitled to an injunction which would restrain the Defendant company from using their trade-mark at all. But ultimately this contention was given up. Obviously it could not be maintained in the face of the proviso at the end of the 6th section of the *International Copyright Act*, 1886. Undoubtedly the Defendants are within the protection of the proviso, so far as regards their trade-mark, and its user. They had before the date of the publication of the Order in Council lawfully produced a work, viz.: their trade-mark, and had rights arising from or in connection with such production, which were subsisting and valuable at the date of the publication of the Order. The trade-mark was lawfully produced, because at the date of its production in January, 1887, the Plaintiff *Schauer*, and those from whom he claims, had no copyright in *England*.

In the result of the argument, the Plaintiff's counsel asked merely for an injunction; and the injunction they sought was one so framed, as while leaving the Defendant company in the full enjoyment of their trade-mark, would preclude them from using their show cards and price lists. The issuing of the show cards and price lists was the only ground of complaint which remained, after the case as to the trade-mark had been abandoned. [His Lordship, having referred to and described one of the show cards, and having stated the use made of them by the Defendant company as above, continued:—] It has been alleged by the Plaintiff that these show cards can be framed, and that this is what the Defendant company intended or contemplated should be done by their customers or others into whose hands the show cards may come; the Plaintiff has taken a show card and framed it with a mount which cuts off the words "*Ozokerit Candles*" and the Defendants' names, leaving the representation of the girl alone visible in the oval of the mount, and says, "See what can be done with the card; a work of art is produced which can be hung up as a picture." But the Defendant company cannot be made responsible for acts which they neither do, nor intend, or even contemplate should be done by others. The point of law

raised was on the words in the proviso at the end of sect. 6— "rights or interests arising from or in connection with such production which are subsisting and valuable." Now a show card, used as the Defendant company use, and intend to use theirs, is only one of the numerous modes of advertising adopted at the present day. The advertisement by show cards or otherwise of their trade-marks is a common and well-known practice on the part of the proprietors, from which they derive benefit by the increased sale of their goods. It was urged for the Plaintiff that the word "rights" in the proviso meant an exclusive right in a particular person, and not a right enjoyed by the public generally; and it was said that the proprietor of a trade-mark has not a "right," in this sense, of advertising his trade-mark, and that any person is at liberty to advertise another's trade-mark. It is not very easy to understand how a trade-mark can be honestly advertised by any person other than the proprietor of the mark, or persons selling, or intending to sell, the goods manufactured under the trade-mark. Persons not interested in the sale of the goods, do not, as a matter of fact, when acting honestly, advertise the trade-mark with a view to push the sale of the goods. Traders, in matters of business, are not in the habit of acting upon motives of mere benevolence to other traders, by advertising, at their own expense, trade-marks in which they have no concern, for the benefit of the proprietors or others interested in the sale of the goods. But passing by the word "rights," I come to the word "interests." The decision in *Moul* v. *Groenings* (1), if authority be wanted, shews that "interests" in the proviso has a more extended meaning than "rights." Some attempt was made by one of the Plaintiff's counsel to use the judgment delivered in that case for the purpose of cutting down the meaning of the word "interests" to "capital embarked" or in some other way. But the judgment did nothing of the kind. What was decided was that the bandmaster had an interest and was protected. The Defendants as the proprietors of the trade-mark have, in my opinion, an interest in advertising it, and this interest is a special interest in them as distinct from the rest of the public. This interest I hold was

(1) [1891] 2 Q. B. 443.

CHITTY, J.
1892
SCHAUER
v.
J. C. & J. FIELD, LIMITED.

an interest arising from or in connection with the trade-mark itself, and was subsisting and valuable at the date of the publication of the Order in Council. This interest in the Defendants is wholly unconnected with any copyright in the Defendants; they have none and claim none; it arises from or in connection with their trade-mark alone. It becomes immaterial then to consider when any particular show card or advertisement of the trade-mark was first produced by the Defendants. The interest of the Defendants to advertise the mark is general, and is not confined to any particular show card or other form of advertisement adopted before the publication of the Order in Council. In effect, the Plaintiff, while conceding to the Defendants the right to use the trade-mark, is endeavouring, by the injunction he seeks, to deprive the Defendants of some of the ordinary and legitimate benefits enjoyed by proprietors in connection with their trade-marks. It is absurd to say that the owners of a trade-mark may use it, but not advertise it.

One point remains to be noticed in connection with the show cards. The trade-mark as registered contained, as already mentioned, the words "*Trade Mark*" printed on the girl's figure below the waist, and these words are omitted in the show cards. Thereupon it was suggested towards the close of the reply that the Defendants were advertising on their show cards not the trade-mark but something else. If they were really doing this, their act would not be protected by their interest in the mark. But this omission appears to me to be too trifling to frame anything upon it. The Defendants are not, under guise or pretence of advertising their mark, really putting forth an independent picture or work of art; they are honestly advertising the substance of their trade-mark. If any other trader put the representation of the girl, as she appears in the show card, on goods not of the Defendant company's manufacture, he would clearly be taking the substance of the Defendant company's mark and would infringe the Defendant company's rights in the mark.

It is not necessary to consider the trade lists separately; what I have said as to the show cards applies, with at least equal force, to the trade lists.

For these reasons, and expressing no opinion on the other points raised, I think the action fails, and must be dismissed.

[This application was by consent treated as the hearing of the action, which was set down and dismissed with costs, except certain costs occasioned by obtaining evidence as to German law.]

Solicitors: *Herbert Bentwitch; Edward Chester.*

W. C. D.

NORTH, J.
1892
Nov. 1.

In re BRIDGER.
BROMPTON HOSPITAL FOR CONSUMPTION *v.* LEWIS.

[1892 B. 2675.]

Will—Construction—Gift to Charity of such part of Residue "as may by Law be given for Charitable Purposes"—Will made before passing of the Mortmain and Charitable Uses Act, 1891—*Death of Testator after passing of Act—Mortmain and Charitable Uses Act*, 1891 (54 & 55 *Vict. c.* 73), *s.* 9.

A testator, by his will, made before the passing of the *Mortmain and Charitable Uses Act*, 1891, bequeathed the residue of his estate to trustees, in trust to pay the income thereof to his wife for her life, and from and after her decease in trust to pay "such part of my said residuary trust estate which may by law be given for charitable purposes," to the *Brompton Hospital*, and, as to the remainder of the said residuary trust estate, upon trust for *Elizabeth Williams* absolutely. The testator died after the passing of the Act:—

Held, that the Act applied:

Held, also, that the will did not shew any intention on the part of the testator to confine the gift to the hospital to such property only as could by the law, as it stood at the date of the will, be given for charitable purposes, and that the hospital was entitled to all the residue of the testator's estate, realty as well as personalty.

SUMMONS by the *Brompton Hospital for Consumption*, asking for the determination of the question whether, upon the true construction of the will, dated the 29th of June, 1891, of *Walter Bridger*, who died on the 20th of February, 1892, the Plaintiffs were, subject to the life interest of the testator's widow *Ann Bridger*, entitled to the whole of the testator's residuary estate, or whether the Defendant *Elizabeth Williams* was entitled to any and what part thereof.

By his will the testator gave, devised, and bequeathed the residue of his real and personal estate to trustees, upon trust for sale and conversion and investment of the proceeds, and to pay the income thereof to his wife during her life, and, from and after her decease, "In trust to pay such part of my said residuary trust estate which may by law be given for charitable purposes unto the *Brompton Hospital for Consumption*, and as to the rest and remainder of the said residuary trust estate upon trust for *Elizabeth Williams* absolutely."

At the date of the testator's death his property consisted of freehold and leasehold houses, money due on mortgage, and pure personalty.

The *Mortmain and Charitable Uses Act*, 1891, was passed on the 5th of August, 1891.

The Defendants to the summons were, the trustees of the will and *Elizabeth Williams*.

Sir *A. T. Watson*, Q.C., and *J. T. Prior*, for the hospital:—

The law in force at the date of the testator's will was the *Mortmain and Charitable Uses Act*, 1888, the provisions of which were in substance the same as those of 9 Geo. 2, c. 36. The law has been altered by the *Mortmain and Charitable Uses Act*, 1891 (1), by virtue of which land may now be given by will to charitable uses. That Act applies to the will of a testator dying after its passing. The will does not say "which may now by law be given for charitable purposes"; it means, "which may by law be so given at the time when the will comes into operation."

[They were stopped by the Court.]

Cozens-Hardy, Q.C., and *C. Crawley*, for Miss *Williams*:—

The legal effect of the will at the time when it was made was the same as if the testator had said, "I give my land and my impure personalty to *Elizabeth Williams*." The words of a specific gift ought to be construed according to their meaning at the time when the will was made: *Jones* v. *Ogle* (2); *In re March* (3).

(1) By sect. 3: "'Land' in the *Mortmain and Charitable Uses Act*, 1888, and in this Act, shall include tenements and hereditaments, corporeal and incorporeal, of any tenure, but not money secured on land or other personal estate arising from or connected with land; and the definition of land contained in the *Mortmain and Charitable Uses Act*, 1888, is hereby repealed."

By sect. 5: "Land may be assured by will to or for the benefit of any charitable use, but, except as hereinafter provided, such land shall, notwithstanding anything in the will contained to the contrary, be sold within one year from the death of the testator, or such extended period as may be determined by the High Court, or any judge thereof sitting at Chambers, or by the Charity Commissioners."

By sect. 9: "This Act shall only apply to the will of a testator dying after the passing of this Act."

(2) Law Rep. 8 Ch. 192, 195.

(3) 27 Ch. D. 166, 169.

NORTH, J. 1892 — *In re* BRIDGER. BROMPTON HOSPITAL FOR CONSUMPTION v. LEWIS.

If *Hasluck* v. *Pedley* (1), and *Capron* v. *Capron* (2), are authorities to the contrary, they are inconsistent with the opinions expressed by the Court of Appeal in the other two cases.

In *Doe* v. *Underdown* (3), Chief Justice *Willes* said: "The intent of the testator ought always to be taken as things stood at the time of making his will, and is not to be collected from subsequent accidents which the testator could not then foresee." The testator has not shewn a paramount intention to give to the charity all that at the time of his death he might by law be able so to give; his intention was to divide his property in a particular way between the charity and the residuary legatee.

Ingle Joyce, for the executors.

NORTH, J.:—

In my opinion, this question is concluded by the language of sect. 9 of the Act. I understand that section to mean that the Act shall apply to the will of a testator dying after the passing of the Act. I have been asked to read sect. 9 as if it had said that the Act shall only apply to a will made, or confirmed by a codicil made, after the passing of the Act. But why should "dying" after the passing of the Act be referred to at all, if the date of the making or of the confirmation of the will is really the important thing? If the really important question is, whether the will was made after or before the passing of the Act, the date of the death of the testator is immaterial. In my opinion, sect. 9 makes the death of the testator after the passing of the Act the test whether the Act applies to his will, and I must treat that section as meaning what it says.

As regards the language of the particular will, no doubt the testator might have expressed a contrary intention; he might have manifested an intention to give to the charity only what the law as it stood at the date of his will permitted him to give. But I cannot read this will as having such a meaning. I think the testator's intention was to give to the charity all that he could give, and to give to the residuary legatee only that which

(1) Law Rep. 19 Eq. 271. (2) Law Rep. 17 Eq. 288.
(3) Willes, 293, 297.

he could not give to charity. In my opinion, the words "which may by law be given to charitable purposes," refer to the period when his will shall come into operation, and must be construed accordingly. I need not go through the cases which have been cited in detail. I fail to see any reasons why *Hasluck* v. *Pedley* (1), and *Capron* v. *Capron* (2) do not apply, and I can see nothing in the two other cases in the Court of Appeal inconsistent with them. I must declare that the Plaintiffs are entitled to the whole of the residue of the testator's estate.

Solicitors: *Norton, Rose & Co.; Stanley Evans.*

W. L. C.

Ex parte CHAMBERS.

[1892 C. 1704.]

Company—Parliamentary Deposit—Abandonment of Undertaking—Repayment to Depositor—Jurisdiction of Court—Parliamentary Deposits and Bonds Act, 1892 (55 & 56 *Vict. c.* 27), *s.* 1.

Under sect. 1 of the *Parliamentary Deposits and Bonds Act*, 1892, the Court has no jurisdiction to make an order for the repayment of a Parliamentary deposit until the time limited for the completion of the company's undertaking has expired, even though the company's compulsory powers for the purchase of land have expired, and they have raised no capital and have taken no steps to acquire land, and have passed a resolution to abandon the undertaking.

SUMMONS by *Charles Chambers* and *W. C. Chambers*, asking that a sum of £7488 New Consols, standing to the credit of *Ex parte* the Applicants, on behalf of the *South Hampshire Railway and Pier Company*, should be transferred to *Charles Chambers*.

The fund represented a Parliamentary deposit, made on the application of the company for a Bill in Parliament.

The *Swindon, Marlborough, and Andover Railway Company* were incorporated by an Act 36 & 37 Vict. c. cxciv., and by subsequent Acts, passed in 1882 and 1883, further powers were conferred on them, and part of their undertaking was formed into a separate undertaking, called the Southern Section. In 1886,

(1) Law Rep. 19 Eq. 271. (2) Law Rep. 17 Eq. 288.

NORTH, J.
1892
Ex parte CHAMBERS.

a new company, called the *Midland and South Western Junction Company*, was formed by the amalgamation of the *Swindon Company* with another company.

By an Act 49 & 50 Vict. c. cxvi., a company was incorporated, by the name of the *South Hampshire Railway and Pier Company*, "for the purpose of the purchase, construction, and maintenance of the Southern section undertaking," of the *Midland and South Western Company*, and provisions were made for the sale and purchase of the undertaking accordingly. By sect. 20 of this Act, all the powers, rights, privileges, and authorities vested in the *Midland and South Western Company* (called "the existing company") under the Acts of 1882 and 1883, respectively, for the taking of land and the execution of works, &c., were, from the date of transfer of the Southern section, by virtue of the Act transferred to and vested in the *South Hampshire Company*. The times for the exercise of the powers granted by the Acts of 1882 and 1883 for the compulsory purchase of lands for the purposes of the works thereby authorized were extended, and the times limited by the Acts of 1882 and 1883 for the completion of those works were also extended. By an Act 52 & 53 Vict. c. cxcviii. further powers were conferred on the *South Hampshire Company*, and the times limited by the previous Acts for the compulsory purchase of lands and for the completion of the works were again extended.

All these Acts contained the usual provisions with reference to the Parliamentary deposit fund.

On the 21st of June, 1891, the *South Hampshire Railway and Pier Act*, 1891 (54 & 55 Vict. c. cxxxi.), was passed. This Act extended the times previously limited, as follows: for the compulsory purchase of lands for the purposes of the works authorized by the Act of 1882, until the expiration of two years from the 10th of August, 1890; for the completion of the works authorized by the Act of 1882, until the expiration of two years from the 10th of August, 1893; for the compulsory purchase of lands for the purposes of the works authorized by the Act of 1883, until the expiration of two years from the 16th of July, 1890; and for the completion of the works authorized by the Act of 1883, until the expiration of two years from the 16th of July,

1893. The provisions contained in the former Acts in relation to the repayment of the Parliamentary deposit, were repealed and, in lieu of them, fresh provisions were made, which were, in substance, identical with those contained in sect. 1 of the *Parliamentary Deposits and Bonds Act*, 1892 (55 & 56 Vict. c. 27).

The company had never raised any capital, and they had never acquired any land, or given any notices to exercise their compulsory powers. On the 4th of April, 1892, a meeting of the company was held, at which the following resolution was passed: "That the necessary steps be taken forthwith, to abandon the undertaking of the company, in pursuance of sect. 8 of the *South Hampshire Railway and Pier Act*, 1891, and to obtain the repayment or re-transfer of £7488 $2\frac{3}{4}$ per cent. Consols, transferred into the name of the Paymaster-General in respect of the application to Parliament for the Act."

The summons was taken out in May, 1892.

J. D. Fitzgerald, for the Applicants:—

Previously to the recent legislation the special Acts of railway companies contained provisions for the forfeiture to the Crown of the Parliamentary deposit, in the event of the non-completion or abandonment of the undertaking, and, in order to escape from the forfeiture, it was necessary for the company to obtain an Act authorizing the abandonment of the undertaking. Under sect. 1 (1) of the *Parliamentary Deposits and Bonds Act*,

(1) Sect. 1: "(1.) Where in pursuance of any general or special Act of Parliament, or of any rules made thereunder, moneys or securities have been deposited with, or are standing in the name of, the Paymaster-General to secure the completion by any company of any undertaking authorised by Parliament, or by any certificate issued under the authority of an Act of Parliament, and the undertaking has not been completed within the time limited in that behalf, the High Court may, notwithstanding anything in such general or special Act or rules, order that the moneys or securities (in this Act called the deposit fund), or any part thereof, be applied towards compensating any landowners or other persons whose property has been interfered with or otherwise rendered less valuable by the commencement, construction, or abandonment of the undertaking, or any portion thereof, or who have been subjected to injury or loss in consequence of any compulsory powers of taking property given in connexion with the undertaking, and have received no compensation or inadequate compensation for such injury or loss. . . .

"(2.) Subject to payment of any

MBL. LONDIN. UNIV.

NORTH, J. 1892 *Ex parte* CHAMBERS.

1892, this is no longer necessary; but the Court has power to deal with the deposit. The company have done nothing under their powers, and have resolved to abandon the undertaking. There can be no claim for compensation. It is impossible that the undertaking should now be completed, unless fresh Parliamentary powers are obtained.

Broomfield, for the company:—

If the Court cannot act until the undertaking has *de facto* come to an end by the expiration of the time limited for the completion of the works the reference in sect. 1 to the "abandonment" of the undertaking would have no meaning, for that which has already come to an end cannot be "abandoned." There is no obligation on the company to make the railway; there is only a privilege conferred on them. If the company renounce their privilege, it may well be said that the time limited for the completion of the works has come to an end.

NORTH, J.:—

I cannot see that I have any jurisdiction before the time which is mentioned in the Act has arrived. Under the old legislation relating to these companies the deposit would now be forfeited to the Crown, unless the company had avoided the forfeiture by obtaining an Act authorizing them to abandon the undertaking. Certain relaxations in favour of the companies have now been made. I have been told that the general public Act of 1892 goes quite as far in favour of the Applicants as the company's special Act of 1891, and, therefore, I need only look

---

such compensation, and notwithstanding any provision as to forfeiture to the Crown, the High Court may, if a receiver has been appointed, or the company is insolvent and has been ordered to be wound up, or the undertaking has been abandoned, order that the deposit fund or any part thereof be paid or transferred to the receiver or to the liquidator of the company, or be applied as part of the assets of the company for the benefit of the creditors thereof.

"(3.) Subject to such application as aforesaid the High Court may, after such public notice as to the Court seems reasonable, order that the deposit fund, or any part thereof, be paid or transferred to the depositors, or the persons claiming through or under them."

at the provisions of the general Act. Now, sect. 1 provides, that where, in pursuance of any Act, moneys have been deposited to secure the completion by any company of any undertaking authorized by Parliament, "and the undertaking has not been completed within the time limited in that behalf," the High Court, subject to providing for the compensation of landowners and others, and the payment of the creditors of the company, may order that the deposit, or any part thereof, be paid or transferred to the depositors. I should feel no difficulty in dealing with the case if the time referred to in that section had arrived—that is, if the time limited for the completion of the undertaking had expired. But that time has not yet arrived, for the time limited for the completion of the works will not expire until 1895. There is nothing to indicate that the undertaking cannot now be completed within that time. It is said that it cannot be completed under the existing powers of the company; that may be so, but it may be possible to obtain further powers. At any rate, I do not see how I can do anything, when the jurisdiction conferred by the Act is given only when the undertaking has not been completed within the time limited, in other words, when the time for completion has expired. It is said that it would be a strange result that the deposit should be tied up in this way, when the undertaking has been abandoned, and nothing has been done by the company. But the only question is, whether this Court has jurisdiction now, and, in my opinion, the jurisdiction does not arise until the time limited for the completion of the undertaking has expired. I can make no order upon the summons.

Solicitors: *Fowler & Co.*

W. L. C.

ROBERTS v. BOOTH. ([1893] 1 Ch. 52: 67 L.T. 646).
Distinguished. ROGERS v. WOOD .. .. .. [1948] 1 All E.R. 38

NORTH, J.

1892

Nov. 19.

ROBERTS *v.* BOOTH.

[1891 R. 119.]

Practice—Counter-claim—Dismissal of Action for want of Prosecution—Continuance of Counter-claim—Motion for Judgment on Counter-claim in Default of Reply—Rules of Supreme Court, 1883, *Order* XXI., *r.* 16; *Order* XXIII., *r.* 4; *Order* XXVII., *r.* 11.

After the Defendant to an action had delivered a counter-claim, the action was dismissed for want of prosecution, the Plaintiff not having delivered a reply within the time limited for that purpose:—

Held, that the Defendant was entitled, under Order XXVII., rule 11, to set down the action on motion for judgment according to his counter-claim.

MOTION by the Defendant for judgment for the relief claimed by his counter-claim.

The case was set down as a short cause.

The writ was issued on the 24th of November, 1891. A statement of claim was delivered on the 27th of May, 1892. By it the Plaintiff claimed to have the accounts taken of a partnership between himself and the Defendant; payment of what should be found due to the Plaintiff; and an injunction to restrain the Defendant from continuing to exclude the Plaintiff from the business, and from doing certain other acts complained of. On the 21st of June, 1892, the Defendant delivered a defence and counter-claim. By the defence he said that the partnership had been dissolved by mutual consent on the 7th of October, 1890, and that it was then agreed that the Plaintiff should assign all the assets of the partnership business to the Defendant absolutely, and that the Defendant should employ the Plaintiff at a weekly salary, subject to a week's notice on either side, and that this agreement had been fully carried out. The Plaintiff quitted the Defendant's service on the 21st of September, 1891. In the counter-claim the Defendant said that the Plaintiff whilst in the Defendant's employment received debts due to the Defendant to the amount of £66 4*s.* 10*d.*, and had applied the same to his own use, and had refused to account for the same or

to pay the same over to the Defendant. The Defendant claimed payment by the Plaintiff of the £66 4*s.* 10*d.* and costs.

On the 9th of November, 1892, an order was made in Chambers dismissing the action for want of prosecution, unless the Plaintiff should deliver a reply within seven days. This was not done.

P. F. Wheeler, for the Defendant:—

[NORTH, J.:—Is a defendant entitled under Order XXVII., rule 11, to move for judgment on his counter-claim?]

By Order XXI., rule 16, if a defendant sets up a counter-claim, and the action is dismissed, the counter-claim may, nevertheless, be proceeded with; and by Order XXIII., rule 4, a reply to a counter-claim is to be subject to the rules applicable to statements of defence. It follows that, if the Plaintiff makes default in delivering a reply, the Defendant may set down the counter-claim on motion for judgment: *Jones* v. *Macaulay* (1).

The Plaintiff did not appear.

NORTH, J.:—

I think that is the right construction of the rules. But there is nothing to shew that the debt claimed by the counter-claim is still due. It may have been paid since the delivery of the counter-claim, or part of it may have been paid. An affidavit must be made that no part of the debt has been paid since the delivery of the counter-claim. On production to the Registrar of such an affidavit and of an affidavit of service of the notice of motion on the Plaintiff, judgment may be entered for the Defendant on his counter-claim.

Solicitors: *A. Scott Lawson*, agent for *W. Foster, Leeds; Hamlin, Grammer, & Hamlin.*

(1) [1891] 1 Q. B. 221.

W. L. C.

STIRLING, J.

1892

Oct. 25;
Nov. 2.

In re ABBOTT.
PEACOCK *v.* FRIGOUT.

[1892 A. 735.]

Will — Remoteness — Rule against Perpetuities — Invalid Power of Appointment — Validity of Limitations in Default of Appointment.

Limitations depending or expectant upon a prior limitation which is void for remoteness are themselves invalid; but limitations in default of appointment under a power which is void for remoteness are not necessarily invalid unless they are themselves obnoxious to the rule against perpetuities.

ADJOURNED SUMMONS.

Sarah Abbott, widow, who died on the 18th of January, 1892, by her will, dated the 6th of December, 1890, bequeathed as follows:—

"I give and bequeath the sum of £1000 to and for the benefit of my goddaughter *Anna*, the wife of *Sydney Willis*, of 50, *Acacia Road, St. John's Wood*. And I direct my trustees to invest the said sum of £1000 in their names in any investment allowed by law for trust funds and to hold the same respectively upon trusts for the benefit of the said Mrs. *Sydney Willis* and her husband and family as follows, that is to say, upon trust to pay the income to the wife for her life for her separate use without power of anticipation, and after her death to the husband for life, and after the death of the survivor upon trust for such one or more of the children of the marriage as the parents or the survivor shall by deed or will appoint, and in default of appointment for all the children of the marriage, who, being sons or a son, shall attain the age of twenty-one years, or, being daughters or a daughter, shall attain that age or marry under that age, share and share alike, but subject to hotchpot in respect of any appointed share. And in default of any children, upon trust for such persons as the wife shall by deed or will appoint. And in default of appointment for the persons who would under the *Statute of Distributions* be entitled to the personal estate of the wife if she had died intestate and without having been married."

The testatrix afterwards bequeathed a sum of £3500 to each of the children of her late husband, naming them, and amongst them to *Catherine Robinson Abbott*; and she directed that the said sums should not be paid to any of her said stepchildren being a son until he should have completed his twenty-fifth year, and that the shares of such of her stepchildren as might be daughters should be invested by her said executors and trustees and held by them upon the same or similar trusts corresponding to these of and concerning the legacy of £1000 given to her goddaughter *Anna*, the wife of *Sydney Willis*, and the testatrix gave the ultimate residue (if any) of her estate to her sister *Matilda Whitehead* for her life, and after her death as she should by will appoint. At the time of the death of the testatrix *C. R. Abbott* was unmarried; she had since married and was now the wife of *Augustus Alfred Frigout*.

This was an originating summons taken out by the executors and trustees of the will of the testatrix for the determination (*inter alia*) of the question whether the trusts by the will declared of and concerning the legacy of £3500 given to the Defendant *C. R. Abbott* were to any and what extent void as transgressing the rule against perpetuities.

The summons was heard on the 25th of October, 1892.

Beale, Q.C., and *Fossett Lock*, for the summons:—

There is no question that the husband must be ascertained within the prescribed period, and the trusts in favour of the children are not invalidated by the fact that the power might possibly be exercised at a time beyond the period.

This case can be distinguished from *In re Harvey* (1); *In re Frost* (2); *In re Hargreaves* (3).

Buckley, Q.C., and *MacSwinney*, for Mrs. *Frigout*:—

All the limitations subsequent to those in favour of Mrs. *Frigout* and her husband are void for remoteness. The power of appointment given to the husband and the limitations in default of appointment are invalid. Mrs. *Frigout* might have married, and

(1) 39 Ch. D. 289. (2) 43 Ch. D. 246.
(3) 43 Ch. D. 401.

STIRLING, J. 1892 *In re* ABBOTT. PEACOCK *v.* FRIGOUT.

if she should become a widow, she might still marry a husband who was not living at the testatrix's death, and in such an event the property might be tied up during a period in excess of that allowed by law. The true test is whether or not the property might be tied up during a life not in existence at the testatrix's death: *In re Frost* (1).

The fact that the power may be exercised in favour of children who might come into existence within the period makes no difference. If the person to take may not be ascertainable within the period the gift is void: *In re Harvey* (2).

The result is that Mrs. *Frigout* is entitled to the income of the legacy during her life for her separate use without power of anticipation, and to the *corpus* thereof subject to the life interest therein of any husband who may survive her.

[STIRLING, J.:—Does the invalidity of the power affect the validity of the gift over?]

Yes; if the gift over be upon a contingency which is bad: *Slark* v. *Dakyns* (3); *Re Thatcher's Trusts* (4).

[STIRLING, J., referred to *Webb* v. *Sadler* (5).]

Hastings, Q.C., and *Stock*, for *Matilda Whitehead*.

Ashton Cross, for Mr. *Frigout*.

1892. Nov. 2. STIRLING, J. (after stating the facts, continued):—

The objection to the validity of these provisions arises on the trust in favour of such one or more of Mrs. *Frigout's* children as the parents or the survivor shall by deed or will appoint. It is said that Mrs. *Frigout* might have married or (if she become a widow) may hereafter marry a husband who was not living at the death of the testatrix; that such husband may survive her, and may be in a position to exercise the power of appointment conferred on him as such survivor, and that as the result of this the property would or might be tied up for a greater period than the duration of a life or lives in being at the death of the testatrix

(1) 43 Ch. D. 246.
(2) 39 Ch. D. 289.
(3) Law Rep. 10 Ch. 35.
(4) 26 Beav. 365.
(5) Law Rep. 8 Ch. 419, 426.

and twenty-one years after that event; and it is contended that not only is the power of appointment bad, but that the trusts in default of appointment are bad also.

The powers of appointment conferred on Mrs. *Frigout* jointly with her husband, and on her if she survives him, appear to me to be valid; but the power purported to be conferred on a husband of hers who may survive her, may be, and I will assume is, open to objection. The main question which I have to consider is, whether the trusts in default of appointment are thereby invalidated. It is settled that any limitation depending or expectant upon a prior limitation which is void for remoteness is invalid. The reason appears to be that the persons entitled under the subsequent limitation are not intended to take unless and until the prior limitation is exhausted; and as the prior limitation which is void for remoteness can never come into operation, much less be exhausted, it is impossible to give effect to the intentions of the settlor in favour of the beneficiaries under the subsequent limitation. On this I may refer to the judgment of Mr. Justice *Buller*, in *Robinson* v. *Hardcastle* (1); *Routledge* v. *Dorril* (2); *Beard* v. *Westcott* (3); and especially to the comments of Lord *St. Leonards* on the last-mentioned case in *Monypenny* v. *Dering* (4). This reason does not necessarily apply to limitations in default of appointment. In many, perhaps I ought to say in most, cases of such limitations the intention is that they should take effect unless displaced by a valid exercise of the preceding power of appointment. An example of this is to be found in *Webb* v. *Sadler* (5), where the donees of a limited power of appointment purported to exercise it by appointing to trustees upon such trusts as *A. B.*, one of the objects of the power, should, with certain consents, appoint; and in default of, and subject to any such appointment, upon certain trusts which were within the power. It was held by the Court of Appeal that although the power of appointment purported to be conferred on *A. B.* was void, the trusts in default of appointment were valid. Lord *Selborne* says (6): "The next question is, whether the subsequent

(1) 2 T. R. 241, 251.
(2) 2 Ves. 357.
(3) 5 B. & Al. 801; T. & R. 25.
(4) 2 D. M. & G. 145, 181, 182.
(5) Law Rep. 8 Ch. 419.
(6) Ibid. 426.

STIRLING, J. 1892 *In re* ABBOTT. PEACOCK *v.* FRIGOUT.

appointments, 'in default of and subject to any such limitation or appointment,' containing dispositions in favour of the son, are so connected with the void power, that the void power failing they fail also. It seems to me that such a construction would be expressly contrary to the declared intention. The declared intention is, that unless estates that would displace this gift to the son are created in favour of other persons by means of the power, then the son is to take under this part of the instrument; and if the power is void, then no such estate could be created, and the event never could arise which alone was meant to prevent the gift in favour of the son taking effect. The words 'and subject to,' confirm this view. If it had been intended to create a charge, and the gift made to the son were 'subject to the charge' then, if the charge did not arise, the son would have taken it free from that charge." Although the words, "subject to," do not occur in this case, it does not seem to me that the absence of them is material. The gift is in a common form, namely, to the wife for life, with remainder to the husband for life, then in favour of the children whom they or the survivor of them should appoint; and, in default of appointment, for the children at twenty-one, or (as regards daughters) on marriage. The meaning appears to be that after the interest of the parents has ceased, the children attaining twenty-one, or (as regards daughters) marrying, are to take, unless the parents or the survivor, in the exercise of the discretion given them, may see fit to alter the shares or interests which those children are to take: or in other words, that the fund should pass to such of Mrs. *Frigout's* children as being sons should attain twenty-one, or being daughters should attain that age or marry, unless the interests thus created were effectually displaced by the exercise of the power. If the power be to any extent invalid, then the only result will be that these interests can never be displaced. It is not contended that these interests are in themselves obnoxious to the rule against perpetuities; and, in my opinion, the trusts in default of appointment are valid.

During the argument I was strongly under the impression, of which I have not been entirely able to divest myself, that this point had in recent years been repeatedly decided in accordance

with the view which I have just expressed. I have examined the reported cases, but have been able to discover only one which bears on the point, viz., *Wollaston* v. *King* (1), decided by Lord Justice *Giffard* when Vice-Chancellor, and it may be right that I should make a few remarks on it. It arose thus: A testatrix having, under her marriage settlement, power to appoint a fund in favour of the children of the marriage, by her will, in execution of the power, appointed a portion of the fund to her son (being an object of the power) for life, with remainder to such persons as he should by will appoint, and then, in default of appointment, to three daughters of the marriage. Then she appointed further portions of the trust funds in favour of two of the daughters, and by an ultimate trust or gift, she disposed of the residue of the fund in favour of the three daughters who were the objects of her bounty in default of appointment. There is no judgment; but after the argument, Vice-Chancellor *Giffard* held that the power of appointment by will given to the son was void for remoteness, but that the trust fund was well appointed to the three daughters under the residuary appointment. By that I understand, not the gift in default of appointment, but the ultimate gift of residue. The meaning of the testatrix obviously was by that residuary gift to dispose of everything that was not effectually appointed, and therefore I think that the Vice-Chancellor had not to decide the precise point which I have to consider. If, however, he did decide that the gift in default of appointment was bad, it seems to me that that gift would stand on a different footing from the gift which I have to consider, for this reason. The power was a special power of appointment, and the appointees of the son were not directly objects of the power; and the only way in which the power could be maintained would be by holding that the life estate coupled with the power of appointment was in the nature of an interest given to the son. It is, however, pointed out by Lord *Selborne* in *Morgan* v. *Gronow* (2), where he had to consider a similar appointment, that such a gift stands on the same footing as a conditional gift to the object of the power—as, for example, a gift to the son on attaining twenty-five, a limitation which in

(1) Law Rep. 8 Eq. 165. (2) Law Rep. 16 Eq. 1.

STIRLING, J. itself would be too remote. It may be, that in such a case as *Wollaston* v. *King* (1), the proper way of dealing with the gift over in default of appointment is to treat the prior gift as a conditional limitation in itself too remote, so that the gift over would fail in conformity with the rule established by the cases cited above.

1892

In re ABBOTT. PEACOCK *v.* FRIGOUT.

It seems to me that, for the reasons already given, these considerations do not apply to the present case, but that I ought to hold that the trusts in default of appointment are valid. I do not see that it is necessary to go beyond this. I shall not declare that any part of the gift is void. It may be that the present husband's power is good. I decide nothing on that; I leave the point to be decided when it arises. I do not say that a valid appointment might not be made under the power. As at present advised, I think the wife's power is valid. I hold that the trusts in default of appointment, are good. But I express no opinion as to the power of any future husband.

Solicitor: *H. A. Dowse* for all parties.

(1) Law Rep. 8 Eq. 165.

G. A. S.

In re BARING. JEUNE *v.* BARING.

KEKEWICH, J.

1892 ~~ *Oct.* 26.

[1892 B. 196.]

Will—Trustees—Tenant for Life — Remainderman —Leaseholds—Renewal—Rent—Repairs—Fines—Residue—Liability—Trustee Act, 1888 (51 & 52 *Vict. c.* 59), *ss.* 10, 11.

A testator, being possessed of a leasehold house held by him for a term of sixty-one years, renewable every fourteen years on fines for renewal, and under covenants to pay the rent, repair and insure, bequeathed the house to trustees, in trust for his widow for life, with remainder in trust for his son for life, with remainders over; and he bequeathed his residuary estate to his trustees upon trust out of the income to pay all the costs, charges, and expenses of carrying into execution the trusts of his will, and, subject thereto, to hold such residuary estate upon trusts for his children in settled shares :—

Held, reluctantly following *In re Courtier* (1), that neither tenant for life was under any obligation to pay the rent, repair, or insure, or to pay the fines or expenses of renewal; that the rent and the expenses of repair and insurance, during the respective lives of the tenants for life, were payable out of the income of the residuary estate; and that the fines and expenses of renewal were distributable among the beneficiaries of the house according to their enjoyment, such enjoyment to be ascertained by actuarial valuation.

The object of the *Trustee Act*, 1888, was merely to remove the then existing liability of trustees, not to alter any law as between tenant for life and remainderman.

Adjourned summons.

Thomas Charles Baring, late of No. 1, *Grafton Street*, in the county of *Middlesex*, and *High Beach*, in the county of *Essex*, by his will dated the 17th of December, 1889, devised and bequeathed to his trustees, one of whom was his wife, the houses in *Grafton Street*, and at *High Beach*, in which he resided, upon trust to permit his wife to occupy the said houses during her life, and after her death he bequeathed his leasehold house No. 1, *Grafton Street* aforesaid, to his son *Godfrey Nigel Everard Baring*, for his life, with remainders over. And he bequeathed his residuary personal estate to his trustees upon trust to convert the same,

(1) 34 Ch. D. 136.

KEKEWICH, J.
1892
In re BARING.
JEUNE *v.* BARING.

and out of the proceeds to pay his funeral and testamentary expenses, debts, legacies, and legacy duty, and to invest the residue as therein mentioned, and to hold his residuary estate and the investment thereof, thereinafter called his "residuary personal estate," upon trust out of the income thereof, to pay all the costs, charges, and expenses of carrying into execution the trusts of his will, and then to pay an annuity to his wife during her life, and subject thereto, to hold his residuary personal estate upon trust for his children, including the said *Godfrey N. E. Baring*, in certain settled shares. The testator further directed that his trustees other than his wife might retain a commission of 1 per cent. on the net income of his residuary personal estate in each year after deducting all rates, taxes, insurances, and other outgoings and expenses payable by them under the trusts hereinbefore declared.

The testator died on the 2nd of April, 1891, leaving his wife and his son, *Godfrey N. E. Baring*, surviving him.

The testator's house, No. 1, *Grafton Street*—formerly two houses—was held by him under two leases dated in 1880, for terms of sixty-one years renewable every fourteen years upon payment of certain fines, amounting together to £600, by the lessee, "his executors, administrators, and assigns," and subject to various covenants by the lessee "for himself, his heirs, executors, administrators, and assigns," including covenants for payment of the yearly rents, amounting together to £120, and for repairs and insurance.

At the testator's death, No. 1, *Grafton Street* was valued at £30,500. His will contained no provisions as to renewing the leases.

Since the testator's death his widow had been in occupation of the house, and a question having arisen as to who was liable for the rents, repairs, and other outgoings of the house, and the fines and other expenses of proposed renewals of the leases, this originating summons was taken out by the trustees and executors of the will against the testator's widow and his son, *Godfrey N. E. Baring*, to have it determined, (1.) whether the annual rents payable in respect of the house, and the expenses of repairing it and keeping it in repair, ought to be paid by the widow or by

the trustees of the will, and, if by the trustees, out of what part of the testator's estate; and (2.) whether the trustees ought to renew the lease of the house, and if so, how and out of what portion of the testator's estate ought the fines and other expenses of renewal to be paid or provided for.

The testator had fully performed the covenants of the leases during his lifetime.

Sir *H. Davey*, Q.C., and *Ingle Joyce*, for the Plaintiffs:—

A person who accepts the benefit of a specific devise to which a burden is attached, must himself bear the burden, according to the maxim "*Qui sentit commodum sentire debet et onus.*" As to the rents, repairs, and insurance, the only reported cases upon the point are *In re Fowler* (1), and *In re Courtier* (2). In the latter case the Court of Appeal professed to distinguish the former, though whether the distinction is sustainable may be doubted. However, those cases appear to decide that, as between the trustees and the tenant for life, the rents, &c., are payable by the tenant for life. If that is so as to the rents and the performance of the covenants, the fact of there being a fine payable can make no difference. It only comes to this, that, instead of a large annual rent being payable, a periodical increased rent is payable every fourteen years. The *Trustee Act*, 1888, has some relation to the question of renewal. Under sect. 10 the trustees are not under any obligation to renew, unless a beneficiary requires them to do so. If the trustees do renew, and have no money in their hands for the purpose, they may, under sect. 11, charge the money required upon the property. But the section was not intended to do more than protect the trustees, leaving the question as to the ultimate liability to be decided between them and the tenant for life. According to *Ainslie* v. *Harcourt* (3), the fines for renewal should be borne by the successive tenants for life according to their actual enjoyment.

Hornell, for the Defendant, the widow, the first tenant for life:—

This is not a case of a gift to a legatee of specific property out

(1) 16 Ch. D. 723. (2) 34 Ch. D. 136. (3) 28 Beav. 313.

KEKEWICH, J.

1892

In re BARING.

JEUNE v. BARING.

and out, but of a gift of a limited interest in settled property; and I submit there is no obligation on the owner of this limited interest, the tenant for life, to pay the rents, repair, or insure. This is a case between tenant for life and remainderman, a question which was not decided in *In re Fowler* (1), but was decided in *In re Courtier* (2), where the Court of Appeal held that, in the absence of any direction in the will, there was no obligation on the part of a tenant for life of leaseholds to comply with the terms of the lease as to repairs. There is no covenant by the tenant for life either with the trustees or with the landlord. The house forms part of the testator's estate vested in his trustees, who are, therefore, the proper parties to pay the rents and perform the covenants, the tenant for life being entitled to have the house kept up for her.

As to the fines for renewal, the tenant for life is not under any obligation to renew, neither are the trustees. If the tenant for life does renew, it is clear that she ought not to bear the whole of the expense of renewal, in exoneration of the remaindermen, who may possibly derive the greater benefit from the renewal. In *Nightingale* v. *Lawson* (3), it was held that, if renewal is merely in the discretion of the tenant for life, a proportion of the cost of renewal should be borne by the remainderman. As to the effect of the *Trustee Act*, 1888, the last clause of sect. 10 says that the section is not to apply to a case in which by the will or settlement the tenant for life is entitled to enjoy his estate without any obligation to renew or contribute to the expenses of renewal, unless his consent in writing is obtained to the renewal on the part of the trustees. I am willing to consent to the renewal; but I say I am not bound to pay the expense of, at all events, the whole of it.

Swinfen Eady, for *Godfrey N. E. Baring*, the next tenant for life:—

My interest in the question is the same as the widow's; if the trustees must pay the rents and perform the covenants during her life, they are equally bound to do so during mine. The

(1) 16 Ch. D. 723. (2) 34 Ch. D. 136.
(3) 1 Bro. C. C. 440.

trustees of the will are the "assigns" of the leases, and, therefore, bound to perform the covenants. They take over the liability of their testator, though with the right of being indemnified out of his estate; and therefore no obligation has devolved upon the tenant for life to perform the covenants. The rents themselves are given to the tenant for life by the will. The observations by Lord Justice *Cotton* in *In re Courtier* (1) exactly apply to this case.

With regard to the fines, the *Trustee Act*, 1888, was not intended to alter the law as between tenant for life and remainderman; but only "to amend the law relating to the duties, powers, and liability of trustees," as the title shews.

[KEKEWICH, J.:—That is my present view, certainly. The object of the Act was to remove the then existing liability of trustees, and not to alter the law as between tenant for life and remainderman.]

The proper course seems to be to apportion the expenses of renewal between the beneficiaries according to their enjoyment. If the money has to be raised by a charge upon capital, the tenant for life cannot be required to do more than keep down the interest.

Sir *H. Davey*, in reply:—

In *In re Courtier* the repairs sought to be thrown on the widow, the tenant for life, were repairs which ought to have been done by the testator himself; and it was held that the widow could not be called upon to make good the default of the testator; but there is no decision that, as to what may be termed "current" liabilities, such as painting, the tenant for life ought not to bear those liabilities. Looking at the terms of this will, the testator seems to contemplate that these liabilities should be discharged out of income, and not capital. I agree that the liability for any breach of covenant or default committed by the testator in his lifetime ought to be borne by his estate. As to the fines, I agree that the fair way of dealing with them, is to throw the burden upon the capital of the leaseholds; but, on behalf of those

(1) 34 Ch. D. 136, 139.

KEKEWICH, J.
1892
In re BARING.
JEUNE v. BARING.

entitled to the residue, I submit that the burden should be thrown on the leaseholds in exoneration of the rest of the estate. The practical way of carrying this out would be to pay the fines out of the residuary estate, and then charge the amount on the leaseholds for the purpose of recouping the estate. I admit that whatever the case may be as to Mrs. *Baring*, it must be the same as to *Godfrey*, the next tenant for life.

KEKEWICH, J.:—

It is certainly strange to find it necessary to decide at the present day what the effect is of such a provision as is contained in the will before me; and, if I may properly say so, if I had not got the decision of the Court of Appeal in *In re Courtier* (1) before me, I should have been prepared offhand, in the absence of argument, to say that the liability must be governed by the principle embodied in the maxim quoted by Sir *Horace Davey*. The testator has given this house in *Grafton Street* to his trustees upon trust to permit his wife to occupy it during her life; and that simply converts her into an equitable tenant for life, placing her in the same position as if he had, in apt language, given the house direct to her for her life. I should have thought, if I had not been instructed by the case to which I have been referred, that she, being tenant for life, ought to keep down those periodical payments which were necessary to her occupation, not because of any liability imposed by express words, and not by any other rule of law than that expressed by the maxim to which I have referred. I have not gone further than the cases which have been cited by the learned counsel, because I have trusted to their industry, as I generally do; but it is very strange that there seems to be no case which defines the position of the tenant for life under those circumstances.

The point appears to have come before the Court of Appeal in the case of *In re Courtier* in as neat a form as one can have it, because there there seems to have been a gift of an equitable estate to the testator's wife for life just as I have here; and on that the Lords Justices expressed a clear opinion, as I read the case, that the tenant for life was not bound to do anything.

(1) 34 Ch. D. 136.

Lord Justice *Cotton* says (1): "There is no rule of law that the tenant for life is bound to do these repairs out of the rents and profits;"—the repairs in question being such as were necessary for the performance of the covenants in the lease—"She is to enjoy these leaseholds in specie, but she is under no covenants to repair; and there is nothing in the will to shew that the testator intended her only to have the net rents after making provisions for the liabilities that arose in the testator's lifetime. It cannot be fairly left to the widow to make good the deficiencies of the testator." That last paragraph applies to a non-performance by the testator in his lifetime of the covenant to repair which gave rise to the question; but I do not read the Lord Justice's remarks as restricted to that, for I understand him to refer to the general question of liability. Lord Justice *Bowen* concurs in that, and says (2): "What obligation is there on her? Is she to take on herself the entire burden and repair them out of her own money, or only to expend the income which she derives from the rents and profits of the property? Whichever way the point is put, the obligation is quite imaginary: it can arise nowhere unless it is to be found in the will. It is admitted that it is not to be found in the will, therefore it does not exist."

Then Lord Justice *Fry* also agrees, and the case derives additional weight because the appellants who failed in that case relied on *In re Fowler* (3), a decision of Lord Justice *Fry*, and all the Lords Justices distinguished *In re Fowler* on the ground that it was not intended to decide a question between tenant for life and remaindermen, which was the question in *In re Courtier* (4), and on that ground they did not overrule *In re Fowler*, although Lord Justice *Cotton* went so far as to say that, if it had been a decision between tenant for life and remaindermen, he should have had some difficulty in following it, but he considered it no authority in the case before him. Therefore, we very nearly come to this, that the Court of Appeal did not think *In re Fowler* properly decided. They do not say so in terms, but they all agree that it did not intend to decide the question between tenant for life and remaindermen, and Lord Justice *Fry* was

(1) 34 Ch. D. 139.
(2) Ibid. 141.
(3) 16 Ch. D. 723.
(4) 34 Ch. D. 136.

KEKEWICH, J.

1892

In re BARING.

JEUNE v. BARING.

party to the decision in *In re Courtier* (1) and so expressed himself in his own judgment.

With the decision in *In re Courtier* before me, I am not at liberty to rely on the general maxim. I there have the point as clearly decided as one can hope to find any point decided, and my bounden duty is to follow that case without regard to what might have been my opinion if it had not been before me.

I think, therefore, that Mrs. *Baring*, while tenant for life, is under no obligation to do any of those things which the trustees as lessees (whether under direct covenant or not is immaterial) are liable to do in order to maintain the property.

Then, if she is not bound to do that, still less is she bound to pay any fines for renewals. It seems to me that is an *à fortiori* case.

I have no doubt also—and I think this seems to be quite free from doubt—that, if Mrs. *Baring* is not liable the next tenant for life, having a similar gift, is not liable either. My judgment will apply to the two, though I am only dealing with the present tenancy for life.

Then, the next question is, Supposing Mrs. *Baring* is not liable, are the trustees liable? I do not think I am called upon to decide the trustees' legal liability now, because they are not here disclaiming an intention to do whatever is necessary to keep this property going. It is a valuable property, and I take it for granted that, supposing the trustees have moneys in hand, which I believe they have, they will not hesitate to keep the property going, whether by performing the periodical covenants—that is to say, the covenants to repair, paint, and pay insurance, and so forth—or by availing themselves of the opportunity of renewing when the time comes. I have not heard anything which leads me to suppose that they desire to be advised whether they ought to do those things or not; but what they do want to know is, how they ought to pay for them. Here I have no case which guides me in the same way as I have been guided on the previous point. I think there is an indication on the face of the will that income charges are to be paid out of income; and that so completely accords with what I think is right on general principles, that I

(1) 34 Ch. D. 136.

willingly accept the indication and hold that that was the testator's intention. Assuming him to have known the effect of his previous gift, which, of course, I must assume, it is natural enough that he should have proceeded in that way. The whole residuary personal estate is all to be got in and converted, and then out of the net proceeds the trustees are to pay the testator's funeral and testamentary expenses, debts, and pecuniary legacies, and the legacy duty. After that the residue divisible among the objects of the testator's bounty is to be held by the trustees on trust out of the income to pay all the costs, charges and expenses of carrying into execution the trusts of the will. That must refer only to those costs, charges, and expenses which will be of a periodical though, no doubt, of a variable character, such as the bill of costs of a solicitor from year to year, the charges of the surveyor, and expenses of that kind, which the trustees will have to incur. I think, therefore, I have a distinct indication that these income charges must come out of income, and that seems to me to be right on principle, and not that these moneys should be paid out of the *corpus* of the trust estate. That would be extremely inconvenient, because the result would be that the *corpus* of the trust estate would be varied every year for the purpose, say, of paying a painter's bill, or a plumber's bill, or things of that kind, and the capital account would never be settled or finally wound up. That would be inconvenient, and, as it seems to me, also against ordinary principles. The ordinary rule is that income bears income charges, and capital capital charges. That, I think, is the proper way to deal with this point.

Then, as regards the renewal, that is another matter. Once in fourteen years the obligation arises of renewing the lease, and there is a large sum to pay. I am told the total fine is £600, and I suppose there would be some communications with the lessor, some documents to be executed, which would involve the employment of a solicitor, and would run up a little sum for costs. All that ought, I think, to be distributed over the estate according to the enjoyment of the estate; that is to say, the persons who have the enjoyment ought to bear the burden in proportion to their enjoyment. Whether that should be done by actuarial valuation

KEKEWICH, J. 1892 *In re* BARING. JEUNE *v.* BARING.

now, in anticipation of the enjoyment, or whether it should be done at a future time when a person is in actual enjoyment, is a matter of a little more practical difficulty. Probably, when the principle is once decided, there will be no real difficulty between the parties; but I should say it ought to be done by an actuarial valuation. The trustees will have to endeavour to get the consent of the parties; but if they do not consent it will be necessary to come to the Court. Mrs. *Baring* says it is very unlikely she will have any enjoyment out of this renewal. If that is so, then an actuary will tell her in a few minutes that she ought to bear nothing, and the burden will come partly on the next tenant for life, and partly on those who come after him. I think the principle is that the fine and attendant expenses ought to be distributed among the beneficiaries according to their enjoyment, which enjoyment may properly be ascertained by actuarial valuation.

Solicitor: *R. T. Wragg.*

G. I. F. C.

JOBSON *v.* PALMER.

ROMER, J.

1892

Nov. 11, 12, 14, 19, 29.

[1891 J. 170.]

Trustee—Liability when Remunerated—Loss of Trust Property by Felony of Servant.

A trustee, although remunerated for his services, is not liable for loss occasioned to the trust estate by the felonious acts of his servant, provided such servant is properly entrusted with the custody of the trust property, and is selected and employed without negligence:—

Semble, that the liability of a trustee is not increased by the fact of his being remunerated for his services.

By an indenture dated the 22nd of July, 1889, and made between *William Jobson*, a watchmaker and jeweller, thereinafter called "the debtor," of the first part, *Augustus Cufaude Palmer*, a chartered accountant, thereinafter called "the trustee," of the second part, and the persons, companies, and firms specified in a schedule to the deed, thereinafter called "the creditors," of the third part, the debtor conveyed and assigned to the trustee substantially all his real and personal estate, upon trust to sell and dispose of the same, and to hold the proceeds "in trust, in the first place, to pay thereout all solicitors' and other costs, charges, and expenses which shall have been or may be incurred in and about the negotiation, preparation, and carrying out of these presents, and in the investigation of the affairs and realization and winding-up of the estate and effects of the said debtor, and to make any payments or allowances which would have preference or be entitled to be paid in full in case of bankruptcy, and in the next place to pay, divide, and distribute the residue of the said trust moneys unto and amongst all and every the creditors of the said debtor, parties hereto of the third part, rateably, according to the amount of the respective debts now owing by the said debtor, or for which he is now liable."

The deed contained no express provision that *Palmer* should be remunerated for his services as trustee; but, on the construction of the deed and under the circumstances of the case, his

ROMER, J.
1892
JOBSON
v.
PALMER.

Lordship held that he was entitled to be remunerated for such services.

On the 31st of July, 1889, the creditors passed a resolution that *Palmer*, as assignee under the deed, should be authorized and instructed to resell the estate to the Plaintiff or his friends for a sum sufficient to pay all costs and preferential claims and a composition of 15*s.* in the pound to the creditors.

Under the above deed and resolution, *Palmer* proceeded to realize portions of the estate, and with the proceeds of sale paid off the costs, preferential claims, and composition, and handed over to *Jobson* the greater part of the property remaining in his possession.

In January, 1891, *Jobson* brought an action against *Palmer*, alleging (*inter alia*) that the Defendant had not accounted to him for all the trust property, and that he had not returned to him all the goods of which he had taken possession, and which remained after the sales required to pay off the costs, preferential claims, and composition; and he claimed a declaration that the Defendant was a trustee for him, by virtue of the deed, of the property therein conveyed and assigned; an account of such property and of the Defendant's dealings with the same; and an order on the Defendant to transfer to him all the trust property except such parts thereof as the Defendant had duly disposed of under the trusts of the deed and had not returned to the Plaintiff, and to pay the Plaintiff the proceeds or value of such of the property as had been disposed of otherwise than in carrying out such trusts.

The evidence shewed that the business of the Plaintiff had been conducted under the management of the Defendant in the manner in which the Plaintiff himself had conducted it; that a man called *Lewis* had been employed in such business by the Defendant; that the Defendant was entitled and bound to employ a man to do the work that *Lewis* was employed to do; that due care had been taken in selecting *Lewis* for the work, he having had a good character when employed from his former master; that neither the Defendant nor his manager had ground for supposing that *Lewis* was not qualified to perform, or, in fact, properly performed, the work he had to do; and that the Plaintiff

was present at the shop throughout the time of *Lewis's* services (with only occasional absences), and never expressed dissatisfaction with the way in which the business was carried on.

Lewis, however, disposed of a watch, forming part of the trust property, for sixteen guineas, for which sum he never accounted, and he stole several other articles, which he pawned, gave away, or otherwise improperly dealt with; and one of the questions argued at the trial was whether the Defendant, as a remunerated trustee or bailee, was liable to the Plaintiff for the value of the things improperly disposed of by *Lewis*.

Arthur Powell, for the Plaintiff.

Neville, Q.C., and *Swinfen Eady*, for the Defendant:—

The Defendant, being remunerated for his services, is in the position either of a bailee for hire, other than an innkeeper or carrier, or of a trustee, and in either case is not liable. An executor or trustee who keeps goods as he would his own is not liable for the value of things stolen: *Job* v. *Job* (1). And where a bailee "is to have a reward for his management, yet he is only to do the best he can. And if he be robbed, &c., it is a good account": *Coggs* v. *Bernard* (2). The liability of a paid trustee is doubtless as high as that of a paid bailee.

[ROMER, J.:—That does not relate to the case of loss by the felony of the bailee's servants. Have you considered the cases of a liquidator and of a trustee in bankruptcy?]

The provisional assignee of a bankrupt has been held not to be liable for the fraud of an agent appointed with due care: *Raw* v. *Cutten* (3). It has also been held that a director is not liable for a fraudulent statement made by his agent, where he did not know the statement was false and has derived no benefit by the receipt of money obtained by means of the false statement: *Weir* v. *Bell* (4).

Unless he has been guilty of negligence, a bailee is not responsible where goods are stolen by his servants: *Coupé Company* v. *Maddick* (5). And in case of loss the *onus* is on the

(1) 6 Ch. D. 562.
(2) 1 Sm. L. C. 9th Ed. pp. 201, 216.
(3) 9 Bing. 96.
(4) 3 Ex. D. 238.
(5) [1891] 2 Q. B. 413.

ROMER, J. 1892 JOBSON v. PALMER.

bailee to prove there was no absence of ordinary care on his part: *Mackenzie* v. *Cox* (1); *Reeve* v. *Palmer* (2).

If the law as to bailees is to be disregarded, and the rules as to a trustee's liability govern the case, it is settled that a trustee is not responsible for losses occurring by the dishonest acts of persons properly employed by him in the usual and regular course of business adopted by prudent men: *Speight* v. *Gaunt* (3); and the fact that the trustee is paid for his services does not add to his liability.

Arthur Powell, in reply:—

The Defendant has not proved that the things were stolen, and the Court will not lightly draw the inference that thefts were committed in the absence of direct evidence. Nor has the Defendant discharged the *onus* of shewing that he was innocent of negligence. A watchmaker has been held bound so to secure property in his hands in the way of trade as to protect it against depredations that may be committed by the persons in his employment: *Clarke* v. *Earnshaw* (4). If the case is like that of a bailee for reward, it is gross neglect to leave valuable property in the uncontrolled and unwatched power of a servant: *Johnston's Claim* (5).

[ROMER, J.:—But here the goods were being daily inquired for.]

If the rules as to trustees are applicable, the Defendant is liable; for a trustee cannot escape liability, even where he is unremunerated, in case of loss occurring by the fraudulent act of his solicitor, though in employing such solicitor he has exercised ordinary care and discretion: *Bostock* v. *Floyer* (6). In *Speight* v. *Gaunt*, the trustee was not remunerated for his services.

1892. Nov. 29. ROMER, J. (after dealing with all the items with which the Defendant was sought to be charged, except those which depended upon the fraud of the man *Lewis*, employed by the Defendant, delivered judgment as follows):—

As to the sixteen guineas for the watch received by *Lewis*, which

(1) 9 Car. & P. 632.
(2) 5 C. B. (N.S.) 84.
(3) 9 App. Cas. 1.
(4) Gow, 30.
(5) Law Rep. 6 Ch. 212, 217.
(6) Ibid. 1 Eq. 26.

clearly cannot now be recovered, that, in my opinion, obviously was fraudulently appropriated by *Lewis* to his own use; and the other items are all articles pawned, given away, or otherwise improperly dealt with by *Lewis*, and which, in my opinion, were clearly stolen by him. The question which arises with regard to these items is whether the Defendant is liable for the criminal acts of his servant. On his behalf it is said that the principle laid down (though not for the first time) in *Speight* v. *Gaunt* (1) applies, and that he is not liable. But the present case differs from that, in the fact that the Defendant was paid for his services. In other respects the cases are similar, for I find as a fact that, under the circumstances, and having regard to the nature of the Plaintiff's business, which had temporarily to be carried on, and to the way in which the Plaintiff's goods had to be offered for sale and sold in order to realize the best prices, the present case was one in which the Defendant was entitled and bound to employ a man to do the work that *Lewis* was employed for. I find no negligence in the selection of *Lewis* for the work. He had a good character when employed, and I am satisfied on the evidence that neither the Defendant nor his manager had any real ground for supposing that *Lewis* was not in every way qualified to perform, and during his services properly performed, the work he had to do at the Plaintiff's shop. Under these circumstances, does the fact that the Defendant was paid by the Plaintiff for his services prevent the application of the principles of *Speight* v. *Gaunt*, and make the Defendant liable for the criminal acts of his servant? I think not. The position of the Defendant may, I think, be well likened to that of a bailee for reward who has to take care of, or do something with, the article handed to him—of course, I am speaking of a common bailee for reward, and not of the special cases of an innkeeper and a carrier. Now, such a common bailee is clearly not liable for the tortious acts of his servants, causing a loss of the articles, unless there has been negligence on his part. And in the present case, as I have said, the Defendant has, in my judgment, discharged the *onus* of proving that there was no negligence on his part. It is true that *Lewis* had access to the Plaintiff's goods; but that was

(1) 9 App. Cas. 1.

ROMER, J. 1892 JOBSON v. PALMER.

inevitable, having regard to the nature of the business and to the fact that the goods had to be shewn to customers and be handed over to them if they bought. I think that the business was being conducted under the Defendant's management in the usual way in which the Plaintiff himself conducted it, and that *Lewis* was employed in the same way in which a servant would ordinarily be employed by the Plaintiff himself in his business. It is important also to remember that the Plaintiff himself was present at the shop throughout the time of *Lewis's* services (with only an occasional absence), and I am satisfied that no representation of any kind was made by him during this time that the business was not being properly conducted, and, moreover, that the business was in fact being then carried on in the usual and proper manner, and to his then satisfaction. These facts render the case before me quite distinct from the cases of *Clarke* v. *Earnshaw* (1), and *Johnston's Claim* (2), where negligence was found. Moreover, if I regard the Defendant not as a bailee for reward, but as a trustee, I see no sufficient reason for confining the principle laid down in *Speight* v. *Gaunt* (3) to cases where the trustee is unpaid, though, no doubt, some of the Judges who decided *Speight* v. *Gaunt* did in their judgments refer to the fact that there the trustee was not paid for his services. I think the principle ought to be applied in a proper case even where the trustee is remunerated, and I think the present is such a case. And, indeed, the point is not wholly free from authority. I may refer to *Raw* v. *Cutten* (4), where the Court had to consider the liability for his agent's defaults of a provisional assignee who was entitled to be paid for his services, and was in other respects very much in the same position as the Defendant here. I may add that that case was clearly decided on general principle, and not on the special circumstance that the provisional assignee was an officer of the Court.

Solicitors for Plaintiff: *Hindson-Miller & Vernon.*

Solicitors for Defendant: *Smith, Fawdon, & Low,* agents for *Wright, Williams, & Wright, Leicester.*

(1) Gow, 30.
(2) Law Rep. 6 Ch. 212.
(3) 9 App. Cas. 1.
(4) 9 Bing. 96.

F. E.

FITZ *v.* ILES.

C. A. 1892 Nov. 8.

[1892 F. 1221.]

Restraint of Trade—Covenant not to keep a Coffee House—Sale of Refreshments by Grocer—Ancillary Business.

The Defendants were bound by a covenant in the lease of their house, not to use the same as a coffee house. The Defendants were dealers in tea, coffee, and other groceries; but they proposed, as ancillary to their business, and for the convenience of their customers, to sell light refreshments consisting of cups of tea and coffee, bread and butter, pastry, ham sandwiches, and pork pies, to be consumed on the premises:—

Held (affirming the decision of *North*, J.), that the sale of light refreshments was carrying on the business of a coffee-house keeper, and was a violation of the covenant; and an injunction was granted accordingly.

Buckle v. *Fredericks* (1) followed.

Stuart v. *Diplock* (2) distinguished.

THIS was an appeal from an order of Mr. Justice *North*.

By an indenture of lease dated the 22nd of December, 1890, the Defendant, *Daniel Iles*, demised a messuage, known as No. 103, *Bermondsey New Road*, to the Plaintiff *George Fitz*, therein described as a coffee-house keeper, for twenty-one years at a rent of £75 a year. The indenture contained a covenant by the lessee, among other things, that he would not, without the consent of the lessor, use the same premises for any other trade or business than that of a coffee-house keeper; and a covenant by the lessor that he would not during the term thereby granted let any shop in the same road, over which he had any control, as a coffee-house.

By an indenture of lease, dated the 30th of May, 1892, the Defendant *Iles* demised another messuage in the same road, known as 113, *Bermondsey New Road*, to the Defendants, *S. A. Went* and *P. R. Buchanan*, therein described as merchants, for twenty-one years at the annual rent of £100. The indenture contained a covenant by the lessees in the following words: "that they shall not, during the said term, use the said messuage and premises, or any part thereof, or permit the same to be used

(1) 44 Ch. D. 244.

(2) 43 Ch. D. 343.

C. A. 1892 FITZ v. ILES.

as a coffee-house or for the purpose of any noisome or offensive trade or business, nor do, or suffer to be done, upon the said premises any act or thing which may be or grow to the annoyance or damage of the lessor or of the tenant or tenants of land or premises adjoining; nor without the consent in writing of the lessor, use the same premises for any other trade or business than that of a tea and coffee dealer and for the sale of non-intoxicating refreshments."

The Defendants *Went & Buchanan*, were dealers in tea, coffee, sugar, and other groceries; but they proposed, for the convenience of their customers and for the purpose of attracting custom to their shop, to supply their customers with cups of tea and coffee, and also with bread and butter, cake, eggs, sandwiches, and other light refreshments to be consumed on the premises. The Plaintiff having ascertained the intention of the Defendants *Went & Buchanan*, and finding that they were fitting up their shop with a view to selling refreshments, commenced the present action, in which he claimed an injunction to restrain the Defendant *Iles* from letting the house No. 113, *Bermondsey New Road*, as a coffee-house, in contravention of his covenant contained in his lease to the Plaintiff, and the Defendants *Went & Buchanan* from using the house as a coffee-house.

The Plaintiff then moved for an injunction until the trial, in the same terms.

The Defendant *Went* filed an affidavit, stating that his firm were interested in several premises which had been opened in various parts of *London*, principally in the poor districts, for the purpose of supplying to the working classes good and pure articles of food at the lowest possible price. The premises opened by the firm were known as "*Te-To-Tums*," and were divided into two classes. The first class consisted of premises containing a shop for the sale of tea, cocoa, coffee, sugar, and other groceries in packets, or in bulk, in the same way as a grocer sells them; and also a refreshment room where breakfasts, dinners, and teas could be obtained, including ham, cold beef, sausages, chops, steaks, and other food of a similar description. Attached to these premises were clubs for working men, under the control of committees, consisting almost entirely of working men.

The second class of premises consisted of shops which carried on what he considered a distinctly different class of business. These shops sold tea, coffee, cocoa, and other articles in packet, in the same way as grocers did, and supplied customers with cups of tea and coffee and light refreshments only. In some of the second-class premises, which were mostly conducted on a small scale, a billiard table, and in rare instances a couple of billiard tables were provided. It was intended to open the premises at 113, *Bermondsey New Road*, as a second-class establishment. He set out a price list, shewing the refreshments which it was intended to sell at the house in question, and which were being sold at establishments of the same class in other parts of *London*. The articles consisted of cups of tea, coffee, cocoa, and milk, buns, biscuits, pastry, slices of bread and butter, or bread and jam, cold sausages, bread and cheese, rolls, slices of cake, ham sandwiches, boiled eggs, pork pies, lemonade, soda water, ginger-beer, cigars, and tobacco. He also stated that the sale of groceries in packets, in shops of the second class, was by far the most important part of the business; the sale of refreshments being only auxiliary to it, and the receipts from the sale of refreshments being only about a twentieth part of the whole money taken.

Mr. Justice *North* granted the injunction, and the Defendants *Went & Buchanan* appealed.

Swinfen Eady, for the Appellants:—

The Defendants are not breaking, or intending to break, the covenant contained in their lease. They are not proposing to keep a coffee-house. They are grocers, and only intend to sell light refreshments for the convenience of their customers, the receipts from which are likely to bear a very small proportion to the receipts of the grocery business. If they proposed to carry on business as they do in their first-class houses, where breakfasts and dinners are provided, there might be some question whether they were not breaking the covenant, but what they propose to do is merely auxiliary to the grocery business, and will not compete in any way with the Plaintiff's business. The fact that they propose to sell some of the same articles as the Plaintiff

C. A. 1892 FITZ v. ILES.

does not bring them within the terms of the covenant, if their business is really a different business from the Plaintiff's. That was expressly decided in *Stuart* v. *Diplock* (1), and *Holt* v. *Collyer* (2) is to the same effect.

Cozens-Hardy, Q.C., and *E. S. Ford*, for the Plaintiff:—

The Defendants are not merely proposing to sell some of the articles which the Defendant sells; they are proposing to carry on a business which will compete with the Plaintiff's business. They admit that it is a business, but they say it is only ancillary to the grocery business, and that the receipts will be comparatively small. But the amount of what they sell makes no difference, the business itself is the business of a coffee-house keeper They propose to sell bread and butter, pork pies, and ham, as well as tea and coffee. *Buckle* v. *Fredericks* (3) is exactly in point.

Swinfen Eady, in reply.

LINDLEY, L.J.:—

This case is not altogether free from difficulty; but I have come to the conclusion that the Plaintiff is entitled to an injunction. The Plaintiff is a coffee-house keeper. He took a lease from the landlord of the Defendants, and in the Plaintiff's lease the Plaintiff is described as a coffee-house keeper, and he took the house for the purpose of carrying on the business of a coffee-house keeper. He covenanted not to carry on any other business, and in order to protect him, his lessor covenanted that he would not, during the term thereby granted, unless in the meantime the lessee should cease to use the premises for such business, let any shop in the same road over which he had any control as a coffee-house. That was obviously to protect the Plaintiff in the enjoyment of his business as a coffee-house keeper. The lessor being under that covenant, let a house to the Defendants, and the Defendants entered into a covenant that they would not during the term, use their house, or permit it to

(1) 43 Ch. D. 343. (2) 16 Ch. D. 718.
(3) 44 Ch. D. 244.

be used, for a coffee-house. I leave out the rest of the restrictive words, which are not important. Then the covenant went on, "Nor without the consent of the lessor use the same premises for any other trade or business than that of a tea and coffee dealer and for the sale of non-intoxicating refreshments."

The Plaintiff says that the Defendants are infringing or proposing to infringe that covenant by using their house as a coffee-house. His right to sue them for an injunction if they are breaking that covenant is not in controversy. The lessor is a party, and there is no technical difficulty about it. The Plaintiff is entitled to enforce against the Defendants that part of the lessor's covenant.

Now that gives rise to the question whether the Defendants are about to infringe that covenant. Mr. *Swinfen Eady* has urged that what the Defendants are proposing to do is not using their house for a coffee-house, although they may sell upon their premises, as incidental to a larger business, some of the things which a coffee-house keeper sells and supplies. The system of business carried on by the Defendants may be gathered from the affidavit of Mr. *Went*, who has given a very candid account of what was done at the Defendants' establishments.

[His Lordship read the affidavit of the Defendant *Went* to the effect stated above, and continued:—]

Now comes the question whether that can be fairly and properly considered as doing anything which is in contravention of the covenant, and that turns again upon whether they are really using these premises for a coffee-house. That they are not using them for a coffee-house exclusively is plain; but on the other hand it is equally plain, I think, from the affidavits, which I will not go further into, that this class of business is calculated to injure the Plaintiff. It is just one of those things which he would be desirous of protecting himself against if he could. But that is not sufficient for him. He must shew that the Defendants are doing something which they are bound not to do.

That gives rise to the question, which is much more easily put than answered, whether the Defendants are carrying on the business of a coffee-house keeper or they are using the premises for a

C. A. 1892 FITZ v. ILES. Lindley, L.J.

coffee-house? Upon that there is conflicting evidence. There are skilled people in the coffee-house trade, coffee-house keepers and brokers, who say this is the business of a coffee-house keeper, and the Defendants are using the premises as a coffee-house, although they are also using them for something else. On the other hand, there is evidence to the contrary effect. We must use our common sense. I think this case is really one of degree, and the conclusion to which I have arrived is that in the fair meaning of this covenant the Defendants are carrying on two businesses, one of which is a grocer's business and the other of which is a coffee-house business, though, perhaps, not a very extensive one. They do not sell everything which coffee-house keepers sell; a coffee-house keeper need not sell all sorts of meats and so forth. He may confine himself to light refreshments such as these. I cannot regard the case as one like *Stuart* v. *Diplock* (1), to which Mr. *Swinfen Eady* has referred us. I look upon this as really a new-fashioned coffee-house, but one to which the covenant is applicable.

In my opinion the learned Judge below was right, and the appeal must be dismissed with costs.

A. L. SMITH, L.J.:—

The question in this case is first of all whether what the Defendants are doing or proposing to do is using the premises for a coffee-house. The Plaintiff is lessee of No. 103, *Bermondsey New Road*, where he carries on the business of a coffee-house keeper, and he has a covenant which he is enabled to enforce against the Defendants, whereby he can prevent them from carrying on business within a certain area as coffee-house keepers. The covenant is that they "shall not at any time during the term use the messuage or permit the same to be used for a coffee-house, nor, without the consent in writing of the lessor, use the same for any other trade or business than that of a tea and coffee dealer, and for the sale of non-intoxicating refreshments." I understand (and I do not think there is any dispute about this), that tea and coffee dealer means the trade of selling dry tea and dry coffee—that is, tea and coffee in packets. The point

(1) 43 Ch. D. 343.

C. A. 1892 FITZ v. LLES. A. L. Smith, L.J.

is, was Mr. Justice *North* right in saying on the evidence in this case that it was shewn that the Defendants were about to use their messuage as a coffee-house? Apart from the larger trade which they are undoubtedly carrying on, namely, of selling tea and coffee in packets, does the evidence establish that either alone or in conjunction with that trade, or ancillary to that trade, they are carrying on or are about to carry on also the trade of a coffee-house keeper? I turn to the evidence which has been filed by the Defendant, Mr. *Went*, and that suffices, in my judgment, to shew what the real trade is they are carrying on and are about to carry on. Mr. *Went* describes the system of these *Tee-To-Tum* businesses, which is a word new to me, as also to Lord Justice *Lindley*. He says there are two classes of business, which they call first class and second class, and he says he is about to carry on at 113, *Bermondsey New Road* the second-class business. No one can doubt that as regards a first-class business at one of these *Tee-To-Tum* houses, although carried on in conjunction with the dry tea and coffee business, it is a coffee-house business pure and simple. It has in it the identical viands which would be sold in a coffee-house, and the identical conveniences for its customers. Therefore class 1 is a coffee-house business. But it is said class 2 is not a coffee-house business, and it is said that it is not because the Plaintiff's business, which is a coffee-house business, consists, as regards eatables, of meats, beef, mutton, and such things, whereas in the second-class business which the Defendants propose to carry on, they are going to provide only cold sausages, bread and butter, bread and cheese, pastry, rolls, buns, ham sandwiches, boiled eggs, and pork pies in conjunction with cups of tea and coffee. How does that differ in reality? Of course it differs in quality; but what of that! The substance must be looked at, and when this is done, in my judgment, the point is not a good one. I should point out that whether class 1 or class 2 businesses are being carried on, the customers obtain similar conveniences. In reading this affidavit of Mr. *Went*, I come to the conclusion that as class 1 would be a coffee-house business, so class 2 would be a coffee-house business, although ancillary, it may be, to a much larger business. The Defendants are going to carry on a coffee-house

C. A. 1892 FITZ v. ILES. A. L. Smith, L.J.

business to the extent of about £350 a year, no mean figure, in direct competition with the Plaintiff in *Bermondsey New Road*. When once the conclusion is arrived at that this is a coffee-house business, then the case in this Court of *Buckle* v. *Fredericks* (1) is in point, and it does not render it any less a coffee-house business because it is carried on as ancillary to another business. I think in this case for the reasons I have stated, and for those which have been given by Lord Justice *Lindley*, the decision of Mr. Justice *North* was right, and that this appeal must be dismissed with costs.

Solicitors: *Spencer, Gibson & Co.; Harston.*

M. W.

C. A. 1892 KEKEWICH, J. *July* 1, 2, 8, 9. C. A. *Nov.* 11.

In re HOYLE. HOYLE *v.* HOYLE.

[1886 H. 4926.]

Parol Agreement—Guarantee—Indemnity—Debt—"Promise to answer for Debt, &c., of Another"—Promise by one Person to Himself and Another—"Note or Memorandum"—Will—Admission by Testator of Guarantee—Statute of Frauds (29 *Car.* 2, *c.* 3), *s.* 4 [*Revised Ed. Statutes, vol. i., p.* 664].

A., being a member of a partnership firm consisting of *A.*, *B.*, and *C.*, verbally agreed with *B.* and *C.* to guarantee his partners against loss in respect of an existing debt due to it from his son, or, according to another version, to guarantee to the firm the balance which should be found due. *A.* died, having by his will given a share of his estate to his son's wife and children; and, after referring to his son's indebtedness to the firm and stating that "he had guaranteed" the firm against loss in respect of the debt, he directed that the amount of the debt should be brought into hotchpot in ascertaining the share given by his will. By a codicil he "confirmed the guarantee mentioned in his will":—

Held, by *Kekewich*, J., that the verbal guarantee was a "special promise to answer for the debt, default, or miscarriages of another person," within sect. 4 of the *Statute of Frauds*, 29 Car. 2, c. 3, and not the less so because the promisees were the firm of which the testator, the promisor, was himself a member; that the will and codicil could not be regarded under the section as a "note or memorandum in writing" of such promise; and that the statements in the will, although they might be binding on the parties

(1) 44 Ch. D. 244.

beneficially interested under the will, were not sufficient to create a debt under the guarantee:

Held, on appeal, that assuming the promise to be one which fell within the 4th section so as to require a memorandum in writing signed by the testator, the recital of it in the testator's will was a sufficient memorandum, and that the promise created a debt payable out of the testator's estate:

Held, by *Bowen*, L.J. (*Lindley*, L.J., inclining to the same view, and *A. L. Smith*, L.J., not giving any opinion), that the promise was, not that the testator would be answerable for the debt of the son, but that he would indemnify the other partners from loss in respect of the debt, and that a memorandum in writing was not necessary.

ADJOURNED SUMMONS.

In 1863 *John Theodore Hoyle* and *Joseph A. D. Shipley* entered into partnership as solicitors in *Newcastle-upon-Tyne* under the firm of "*Hoyle & Shipley.*" In 1866, *J. T. Hoyle's* son, *Theodore Hoyle*, was taken into partnership, the firm being thenceforward known as "*Hoyle, Shipley, & Hoyle.*" *Savile Richard Hoyle* another son of *J. T. Hoyle*, acted as the *London* agent of the two firms successively from 1863 until his death in September, 1879. During that time his father made him various advances, and he also became indebted to the *Newcastle* firms in a considerable sum upon his agency accounts. It appeared that he had always been more or less in financial difficulties, and he died hopelessly insolvent, being indebted both to his father and to the *Newcastle* firms.

By his will, dated the 20th of August, 1879, *John T. Hoyle* gave his residuary estate to his said son, *Theodore Hoyle*, and his partner, *J. A. D. Shipley*, whom he appointed his executors and trustees in trust for sale, and to hold one-fourteenth of the proceeds upon trusts (clause 5) for the wife and children of his son *Savile R. Hoyle*, and the remaining fourteenths upon trusts for his other children and their families. The testator then proceeded as follows (clause 14): "Provided always, that inasmuch as my son, *Savile Richard Hoyle*, is indebted to me separately, and also to me and the said *J. A. D. Shipley*, and also to the respective firms of *Hoyle & Shipley*, and *Hoyle, Shipley, & Hoyle*, in divers sums of money for loans, and otherwise, and may become further indebted, and inasmuch also as I have guaranteed the said *J. A. D. Shipley* and the said respective firms against

C. A. 1892 *In re* HOYLE. HOYLE *v.* HOYLE.

loss in respect of the same debts; I direct that the aggregate amount, inclusive of interest, in which he shall be indebted at my death, either to me alone, or to me along with the said *J. A. D. Shipley*, or my partners in the said respective firms, shall, after realizing any securities which may be held on his property, be brought into hotchpot in ascertaining the amount or value of the share to be held upon trust for his wife and children under the 5th clause, and that the said *S. R. Hoyle* shall stand released from all personal liability for or in respect of the said debts. I direct that in computing the aggregate amount in which my same son shall at my death be indebted as aforesaid, interest after the rate of £5 per cent. per annum on the amount or balance for the time being owing on the footing of yearly rests shall be included."

On the 31st of August, 1881, the testator executed a codicil whereby he directed that, with respect to the 14th clause of his will, the said *J. A. D. Shipley* should have full discretionary power to determine the amount which ought to be brought into hotchpot under such clause, and that his certificate in writing as to such amount should be binding and conclusive on all persons claiming under his will and codicil. Then clause 7 ran as follows: "I confirm the guarantee mentioned in the said 14th clause of my will."

The testator survived his son, *Savile R. Hoyle*, and died on the 23rd of December, 1885.

In 1886 this action was commenced by one of the testator's unmarried daughters, a residuary legatee, against the executors and trustees, *Theodore Hoyle* and *J. A. D. Shipley*, for the administration of his estate, and judgment was pronounced on the 15th of February, 1887. Under an order for a special inquiry, made on the 12th of April, 1892, the Chief Clerk by his certificate, dated the 9th of May, 1892, found that the testator was at his death liable under his verbal guarantee, confirmed by his will, to the firms of *Hoyle & Shipley* and *Hoyle, Shipley, & Hoyle*, in respect of the debts then due to such firms respectively from *Savile R. Hoyle*.

The residuary legatees then took out this summons to vary the Chief Clerk's certificate by finding that the testator was not

at his death under any guarantees or indemnities to the firms of which he was a member, or either of them, in respect of debts due to such firms respectively by *Savile R. Hoyle.*

The Chief Clerk's certificate was based upon affidavits made by *J. A. D. Shipley* and his partner *Theodore Hoyle*, and by *Newton Warburton*, cashier and book-keeper to the two successive firms. *J. A. D. Shipley*, in his affidavit, stated that the testator frequently conferred with him about his loans to *Savile R. Hoyle*, whose indebtedness to the firms was discussed by the deponent with the testator himself and also with *Theodore Hoyle*; that in 1879 *Savile R. Hoyle* admitted himself to be largely indebted to the firms as well as to the testator, although the exact amount of his indebtedness to the firms was not ascertained, and "it was arranged" that he should secure to the testator by mortgage the amount due from him to the testator and the firms, "and that the testator should guarantee to our said firms whatever balance might ultimately be found due from the said *Savile R. Hoyle* to them respectively"; that, pursuant to that arrangement, the amount then owing to the testator and the firms from *Savile R. Hoyle* was ascertained and found to amount to £2200, for which he executed to the testator certain mortgages, "and the testator thereupon agreed to guarantee to our said firms such balance as aforesaid"; that he, the deponent, had absolute confidence in the testator's word, "and I relied implicitly on his verbal agreement to guarantee payment of the said balance, whereby, in the event of the said *Savile R. Hoyle* not discharging his indebtedness to the firms, the amount should be debited to the testator in the firm's account. I did not ask him for a written guarantee, and do not know whether he ever signed one; I have no recollection of ever having seen one, although the said *Newton Warburton* has informed me it is his impression he saw some document in the testator's handwriting which, according to his recollection, was a guarantee to the firm."

Theodore Hoyle also deposed that the indebtedness of his brother to his father's firms was carefully discussed between his father, *Shipley*, and himself, the deponent; and that it was ultimately arranged that his father should guarantee *Shipley* and himself, the deponent, against loss in respect of such indebtedness,

C. A. 1892 — *In re* HOYLE. HOYLE *v.* HOYLE.

and should either pay the amounts which might be found due from *Savile R. Hoyle*, or be debited therewith in his, the father's, account with the firm; that his father was never released from his said guarantees; but that such guarantee was always treated by him, *Shipley*, and himself, the deponent, as subsisting up to his, the father's, death.

Newton Warburton, the firms' cashier and book-keeper, deposed: "I knew that the testator had guaranteed the payment to the firms of the amounts" due to them respectively from the firm of *Hill & Hoyle*, the testator's son *Savile R. Hoyle*, and his son-in-law *B. B. Thompson*. He told me so himself." . . . . and that, to the best of his recollection, he had seen a document, signed by the testator, agreeing to guarantee such payment, but had been unable to find it.

The adjourned summons came on for hearing before Mr. Justice *Kekewich* on the 1st of July, 1892.

Warmington, Q.C., and *Warrington*, for the Applicants:—

This is an attempt to enforce a parol agreement contrary to the *Statute of Frauds*, 29 Car. 2, c. 3, s. 4 (1).

Renshaw, Q.C., and *H. Greenwood*, for the Defendants, *Theodore Hoyle* and *J. A. D. Shipley*:—

This is not an agreement required to be in writing under the statute, because it is a mere "guarantee" (a word not mentioned in the statute), not a promise to answer for the debt or default of another; and to come within the statute, sect. 4, the debt or default must be towards the promisee: but here the testator, being a member of the firm, the promisee was himself the promisor, and therefore could not really be a promisee: *Cripps* v. *Hartnoll* (2);

(1) The material part of sect. 4 of the *Statute of Frauds* is as follows:—

"No action shall be brought . . . whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriages of another person or to charge any person . . . upon any agreement that is not to be performed within the space of one year from the making thereof; unless the agreement upon which such action shall be brought, or some memorandum or note thereof shall be in writing, and signed by the party to be charged therewith. . . ."

(2) 4 B. & S. 414; 32 L. J. (Q.B.) 381.

Wildes v. *Dudlow* (1); *Hargreaves* v. *Parsons* (2); *Re Bolton* (3). But supposing the guarantee is a "promise" within the statute, then the statement by the testator in his will, executed by him, is a "note or memorandum in writing signed by the party to be charged" within sect. 4, or the will itself may be regarded as a promise in writing: *Millington* v. *Thompson* (4). The 4th section of the *Statute of Frauds* does not bar parol contracts, but only bars the legal remedies by which they might otherwise have been enforced: *Maddison* v. *Alderson* (5). The real question in all such cases is whether the matter is sufficiently evidenced in writing, so as to avoid any dispute as to the fact. Any memorandum identifying the parties to the contract and shewing its terms is sufficient: *Chitty* on Contracts (6). All kinds of collateral documents have been allowed—for instance, under the *Statute of Limitations*—to shew an acknowledgment of indebtedness. Even assuming, for the sake of argument, that no guarantee had in fact been given, the statements in the will are, notwithstanding any inaccuracy, binding on the testator, and therefore on those taking under his will: *Quihampton* v. *Going* (7); *In re Aird's Estate* (8); *In re Taylor's Estate* (9); *In re Wood* (10). But, in point of fact, the statements in the will are true, for it is established by the evidence that there was the indebtedness, and that there was the guarantee.

Warmington, in reply:—

I submit that this is a "special promise to answer for the debt, default, or miscarriages of another person," within sect. 4 of the statute, and therefore must be evidenced in writing. *Cripps* v. *Hartnoll* (11) is no authority that to come within the statute the promise must have been made to all the persons to whom the debt is due; a man may promise to answer for the debt of another, to other persons jointly with himself, the promisor. There was

(1) Law Rep. 19 Eq. 198.
(2) 13 M. & W. 561.
(3) 36 Sol. J. 608.
(4) 3 Ir. Ch. Rep. 236.
(5) 8 App. Cas. 467, 474.
(6) 12th Ed. p. 118.
(7) 24 W. R. 917.
(8) 12 Ch. D. 291.
(9) 22 Ch. D. 495, 500.
(10) 32 Ch. D. 517.
(11) 4 B. & S. 414; 32 L. J. (Q.B.) 381.

C. A. 1892 *In re* HOYLE. HOYLE *v.* HOYLE.

no debt at all in the case cited. In *Wildes* v. *Dudlow* (1), and *Re Bolton* (2), there was no "debt" at the time the promise or guarantee was given; there was nothing more than an original contract to pay in a certain event, which afterwards happened. To come within the statute, the debt must, as here, precede the promise.

Then has the "special promise" been evidenced by a "note or memorandum thereof in writing," as required by the statute? I submit not, and that a will is not a sufficient compliance with the statute. *Millington* v. *Thompson* (3) cannot be regarded as a sound decision. A "note or memorandum" within the statute must be of a definite character, and not ambulatory or revocable like a will. That case was under the *Statute of Limitations*, and not under the *Statute of Frauds*; and all it decided was, that the will, being accessible to the creditor, was sufficient as an acknowledgment of the debt given to the creditor, within the meaning of the *Statute of Limitations*. *In re Aird's Estate* (4), *In re Taylor's Estate* (5), and *In re Wood* (6), were decisions as between persons beneficially interested under the will, and not as against creditors or others claiming *dehors* the will.

[KEKEWICH, J., referred to *Mackenzie* v. *Bradbury* (7).]

KEKEWICH, J.:—

The question I have to decide is whether the testator's estate is under any liability for payment of the debt due from *Savile R. Hoyle* to the two firms of which the testator was a member. It is said that the evidence establishes the fact that there was a guarantee or indemnity by the testator against the debt. Upon that point I have before me evidence, not in the slightest degree contradicted, that from time to time the testator used expressions which go to shew that he did guarantee or indemnify his partners; and he himself has so stated in his will. Without pausing to discuss how far a testator can be witness of his own act, of what he has done himself, a question which is open to a

(1) Law Rep. 19 Eq. 198.
(2) 36 Sol. J. 608.
(3) 3 Ir. Ch. Rep. 236.
(4) 12 Ch. D. 291.
(5) 22 Ch. D. 495.
(6) 32 Ch. D. 517.
(7) 35 Beav. 617.

good deal of academical as well as technical discussion, I may for the present purpose conclude that he did enter into such a guarantee or indemnity as is suggested. But did he thereby render his estate liable? In order to answer that question we must come back to what creates the liability; and that liability must be established, if at all, under an agreement to become liable "for the debt, default, or miscarriages of another," which agreement, according to the language of sect. 4 of the *Statute of Frauds*, has to be evidenced by writing. That question is somewhat different from the other. It involves considerations of law, whereas the other is a pure question of fact.

Taking it for granted that the testator did promise his partners that he would guarantee them against the debt of his son, or indemnify them in respect of it, several points are made on the part of those who desire to support the Chief Clerk's certificate and establish the liability. It is first said that a guarantee within the meaning of sect. 4 must be made to the promisee; and in reference to that point *Cripps* v. *Hartnoll* (1) is cited. It was there conceded, as the reporter accurately says, by counsel on both sides, that the debt or default must be towards the promisee. Sir *Henry James* so stated this in his argument on behalf of the Plaintiff, and that statement was admitted by the late Mr. Justice *Archibald*, then at the Bar, who argued on the other side; accordingly, the point, being conceded in that way, was not discussed in the judgments. It is argued here that this testator made a promise, not only to his partners, but also to himself; that is to say, he made a promise to the firm in which he was a partner in respect of a debt due to the firm; and, that being so, he made it, not to the promisees, but to the promisees and another, namely, himself. Technically, or rather as a matter of grammar, that may be true; but I see no reason for applying what was conceded in that case to the state of circumstances existing in the present case. I see no reason why a man may not be liable within the *Statute of Frauds* when a special promise is made by him to another person who is interested in the matter jointly with himself. A man cannot in any reasonable sense promise to answer to himself for the debt, default, or miscarriage

(1) 4 B. & S. 414; 32 L. J. (Q.B.) 381.

C. A. 1892 *In re* HOYLE. HOYLE *v.* HOYLE. Kekewich, J.

of another. The application of the promise is in favour of the person to whom it is made; the object is to guarantee or indemnify the person to whom the promise is made. I see no inconsistency with that principle in saying that a man may promise to answer for the debt, default, or miscarriage of any one man or more to other persons jointly with the promisor. It is for the benefit of those other persons, and may or may not be for the benefit of the promisor jointly with them. That point, which is extremely technical, is one which, in my opinion, does not help the Respondents in this case.

Then I pass on to the next contention, which is, perhaps, more important. It is argued that the will itself is a sufficient promise in writing within the meaning of the *Statute of Frauds*. In support of that the case of *Millington* v. *Thompson* (1) has been cited, the head-note of which is as follows:—[His Lordship read it, and continued:—] I have studied the judgment in that case. It was pronounced by the Lord Chancellor of *Ireland*—a Lord Chancellor of eminence—and to some extent, certainly, it is in favour of the Respondents' view. On the one hand, I am not competent to overrule it, nor should I be disposed to do so, however competent I might be; but, on the other hand, I am not bound to follow it. I am bound to pay great respect to it, and I do so; but, not being bound to follow it, I think I may say that I do not understand it as a proposition of law. That being so, I think I shall be doing my duty by not entering into any criticism of it, but simply saying that, as it stands alone as a decision, and as it is not, to my mind, fully intelligible, I do not feel myself bound by it.

There is no other authority in favour of that view; and principle, to my mind, is against it. Perhaps I ought to mention one criticism, because it is obvious on the face of it, namely, that the acknowledgment, in order to be sufficient within the *Statute of Frauds*, must be equivalent to a promise to pay. It is impossible, to my mind, to conceive that a will which does not take effect until after the death of the testator can be treated as a promise to pay by the testator.

Then, the only other point is this: The testator has recognised

(1) 3 Ir. Ch. Rep. 236.

this guarantee; he calls it so by his will. Nay, more, he has gone further by his codicil, and has referred to his recognition of it, and confirmed that recognition; and it may be, and probably is, the case, that this testamentary statement of his has some effect in the distribution of the estate among the beneficiaries. It does not seem to me that it can have any effect as regards establishing a debt. It may raise a question of election, or a question of intention without raising a question of election; but I do not see how it can possibly create a debt. The cases cited fall very far short of anything of that kind. *In re Taylor's Estate* (1); *In re Aird's Estate* (2); and *In re Wood* (3), all go to shew that a direction of that kind is to be regarded in the distribution of the estate and in adjusting the rights of parties; but none of them at all go to shew that any statement of that kind binds any person not claiming under the will of the testator beneficially; and the case to which I myself referred from old acquaintance, of *Mackenzie* v. *Bradbury* (4), goes to the same point, and shews that such a statement is not and cannot be regarded as a gift of a legacy. Under these circumstances, the clause in this will cannot be regarded as establishing a debt by means of this guarantee or indemnity. It is properly called a guarantee or indemnity. In the argument a distinction was endeavoured to be made between the two; but really, for the present purpose, it may be either a guarantee or an indemnity; and what was said in *Cripps* v. *Hartnoll* (5) illustrates how it might be an indemnity or guarantee, and yet not be for that reason within the *Statute of Frauds*. A man may indemnify his partners in respect of a claim, or he may guarantee them against a claim. Some of the cases cited shew what the distinction is, and how little it goes on the question whether the particular claim comes within the *Statute of Frauds* or not. The point arose in the Court of Chancery in *Wildes* v. *Dudlow* (6), and in the recent case of *Re Bolton* (7), before Mr. Justice *Chitty*, who referred to the various authorities, in none of which was it held

(1) 22 Ch. D. 495.
(2) 12 Ch. D. 291.
(3) 32 Ch. D. 517.
(4) 35 Beav. 617.
(5) 4 B. & S. 414; 32 L. J. (Q.B.) 381.
(6) Law Rep. 19 Eq. 198.
(7) 36 Sol. J. 608.

C. A. 1892 *In re* HOYLE. HOYLE *v.* HOYLE. Kekewich, J.

that there existed the essentials which are required in order to bring the particular case within the *Statute of Frauds*, as being a "special promise to answer for the debt, default, or miscarriages of another." None of them come within the short and concise language of the statute, and to none of them does the statute really apply.

All I hold is that there is no debt of that kind created here; that there is no promise to answer for the debt, default, or miscarriage of *S. R. Hoyle* sufficiently evidenced to meet the requirements of the *Statute of Frauds*. There was the promise, as I have already said, made verbally, but no promise made in writing. Therefore, the result is, that the certificate cannot stand. The order must be that, the Court being of opinion that no promise in writing was made, nor any note or memorandum of a promise, by the testator to answer the debt, default, or miscarriage of *S. R. Hoyle*, as required by the *Statute of Frauds*, the certificate of the Chief Clerk be varied by finding that the Defendants are not entitled to rank as creditors in respect of any guarantee or indemnity by the testator to answer any such debt, default, or miscarriage of *S. R. Hoyle*.

G. I. F. C.

C. A.

The Defendants appealed from this decision. The appeal was heard on the 11th of November, 1892.

Renshaw, Q.C., and *H. Greenwood*, for the appeal:—

Supposing the promise here made to be one that falls within the statute, there is a sufficient memorandum to satisfy the statute. *Sievewright* v. *Archibald* (1) shews the nature of a memorandum within the statute: it need not be cotemporaneous with the agreement; all that is wanted is evidence under the party's hand that he entered into the agreement. The law is expounded in *Barkworth* v. *Young* (2), where an affidavit made by the Defendant's testator in lunacy proceedings taken by him against the Plaintiff was held a sufficient memorandum of a promise made to the Plaintiff on his marriage. In *Jones* v. *Victoria Graving Dock Company* (3), a minute of a meeting of directors signed

(1) 17 Q. B. 103. (2) 4 Drew. 1.

(3) 2 Q. B. D. 314.

by the chairman only for the purpose of verifying the accuracy of the entry was held a sufficient memorandum of an agreement by the company referred to in the minute. The object of the statute is to prevent the temptations to fraud and perjury which would exist if such agreements as therein mentioned could be enforced though established only by parol testimony: *Welford* v. *Beazely* (1); and this object is answered by any memorandum in writing shewing the terms of the agreement and signed by the party to be charged, no matter what the object of the party was in signing it. In *Millington* v. *Thompson* (2) an acknowledgment by will was held a sufficient memorandum. We are, of course, entitled to the benefit of the lien given by the will on *Savile Hoyle's* share; but it is of importance that we should be able to establish our position as creditors against the testator's estate.

We say, further, that the statute does not bear upon the case at all, for that this is not a promise to answer for the debt of another person, but a promise to the other partners to indemnify them, which is not within the statute: *Wildes* v. *Dudlow* (3), where the cases on the subject are all considered.

Warmington, Q.C., and *Warrington*, for the residuary legatees:—

This guarantee must be treated as a *nudum pactum*, no consideration for it being shewn. It is not alleged that the parties agreed to give time, nor is it proved that they gave time on the faith of it.

[BOWEN, L.J.:—Does it not in substance come to this—"Go on dealing with *Savile Hoyle*, and if any loss arises I will make it good"?]

This is a promise to answer for the debt of another person, and requires a memorandum.

[BOWEN, L.J.:—Is it not an agreement with the other partners to indemnify them?]

No. There is a primary liability in *Savile Hoyle*; the testator was only to be secondarily liable, and the language as mentioned

(1) 3 Atk. 503. (2) 3 Ir. Ch. Rep. 236
(3) Law Rep. 19 Eq. 198.

C. A. 1892 *In re* HOYLE. HOYLE *v.* HOYLE.

in the affidavits points at guarantee—not at indemnity. In *Wildes* v. *Dudlow* (1) there was no existing debt at the time when the promise was given. To come within the statute, the debt must precede the promise.

Then as to the will, we contend that a will is not a memorandum within the statute. The memorandum should be something definite and irrevocable, not an ambulatory document like a will.

[A. L. SMITH, L.J.:—Suppose a man made and signed an entry in his diary?]

That probably would be held to be made for the purpose of preserving evidence of the transaction, and might be sufficient; but the recital in the will was not inserted with a view to preserve evidence, but only for the purpose of explaining the dispositions of the will. An admission in an answer in Chancery was ineffectual if the benefit of the statute was claimed, and that appears to be because the answer is compulsory.

[LINDLEY, L.J., questioned whether it could not be used as an admission in another suit, and referred to the judgment of Lord Justice *Fry* in *Lucas* v. *Dixon* (2).]

The will does not contain the terms of the agreement sufficiently. We admit that effect must be given to the directions of the will as against *Savile Hoyle's* share under it; but we say that the Defendants cannot rely on it as a memorandum within the statute so as to make them creditors.

LINDLEY, L.J.:—

This is a curious case raising a question on the *Statute of Frauds*. The testator, a solicitor, was in partnership with his son, *Theodore Hoyle*, and *J. A. D. Shipley*. He had also a son, *Savile Hoyle*, who was indebted to the firm as their agent, and as he was not in a position to pay, a verbal arrangement was come to that he should give a mortgage to his father, and that the father should guarantee the firm against loss in respect of the debt. The father died, and the surviving partners say to the executors, "We are entitled to the benefit of your testator's guarantee."

(1) Law Rep. 19 Eq. 198. (2) 22 Q. B. D. 357, 363.

The executors say, "No, this was a promise to answer for the debt of another and it was not in writing, nor is there any note or memorandum of it in writing to satisfy the *Statute of Frauds*."

The 4th section of the *Statute of Frauds* enacts as follows: "No action shall be brought . . . , whereby to charge the defendant upon any special promise, to answer for the debt, default, or miscarriages of another person, ... unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized."

On the construction of this section, certain points are settled. First, it was settled by *Leroux* v. *Brown* (1), that the statute does not affect the validity of the contract, but only makes a particular kind of proof necessary to enable a party to bring an action upon it. Secondly, it was settled by *Sievewright* v. *Archibald* (2), if it was not settled before, that the note or memorandum in writing must exist at the time when the action is commenced, so that an action cannot be supported by a memorandum obtained after its commencement. As the statute affects only the mode of proof, this rule must be considered anomalous; but it is founded on the wording of the statute.

The statute, it must be remembered, only applies to promises on which actions at law could be maintained. It has no application to promises by one partner to his co-partners to pay money to the firm. Such promises are not actionable at law, whether in writing or not; although they can be enforced in equity by a suit for an account. If therefore the father's promise was a promise to be answerable to the firm for the debt of *Savile Hoyle*, no action could be brought upon it, and the *Statute of Frauds* would not apply. In equity such a promise could be enforced; but still it would not, I think, be within the statute. I however think that the promise was a promise made by the father to the two other partners to indemnify them from any loss arising from *Savile Hoyle's* not paying his debt to the firm. Such a promise is one on which an action might be brought at common law; but it does not fall within the *Statute*

(1) 12 C. B. 801. (2) 17 Q. B. 103.

C. A. 1892 *In re* HOYLE. HOYLE *v.* HOYLE. Lindley, L.J.

of Frauds. All we know of the arrangement is to be found in the affidavits. [His Lordship here read the above extracts from the affidavits of *Shipley* and *Warburton*], and they leave its nature ambiguous; but I doubt whether it was one coming within the statute.

But, assuming the agreement to be within the statute, the Appellants say that the acknowledgment of the promise in the testator's will is a sufficient note or memorandum in writing signed by the testator. The Respondents say that a will is not a memorandum such as is required by the statute. Why should it not be held to be so? The object of the statute was to prevent fraud and perjury by taking away the right to sue on certain agreements if only established by verbal evidence. The policy of the enactment is well explained in *Welford* v. *Beazely* (1), and *Barkworth* v. *Young* (2). The object of the statute being merely to exclude parol evidence, any writing embodying the terms of the agreement and signed by the person to be charged is sufficient. That view was taken in *Barkworth* v. *Young*, and the idea of agreement need not be present to the mind of the person signing. An affidavit made with quite a different object was in that case held to be a sufficient note or memorandum, and so have various other documents. A will is a formal document, and why should it not be sufficient? It is true that the recitals in paragraph 14 of the will are inserted only for the purpose of explaining the directions which the testator was about to give; but the language is plain—"inasmuch as I have guaranteed the said *J. A. D. Shipley* and the said respective firms against loss in respect of the same debts." This is a memorandum amply sufficient to take the case out of the *Statute of Frauds* if apart from the memorandum it is within it, which I am disposed to think it is not. The Appellants, therefore, in my judgment, are entitled to the benefit of the guarantee and to rank as creditors.

BOWEN, L.J.:—

I am in favour of the Appellants on both points. In the first place, I think that the original promise was not a guarantee

(1) 3 Atk. 503. (2) 4 Drew. 1.

within the 4th section of the statute; and, secondly, supposing that it was, I think that there is a sufficient note or memorandum, if it is signed by the testator, to take it out of the statute.

Now, first, is the promise within the *Statute of Frauds?* To bring it within the statute, as being a promise to answer for the debt of another person, you must construe it in this way: "I promise the firm, of which I am a member, that if my son *Savile* does not pay the debt which he owes to the firm, I will pay it." Such a promise is unintelligible as a matter of law and as a matter of business. As regards law, how can a man make a promise to himself and other people? A promise at law can only be made to others. What the testator really did was to promise his partners that if the debtor to the firm did not pay the firm, he (the testator) would make good the loss to the firm. That is not a promise to his partners to pay a debt due from a third party to those partners, but a promise to indemnify the other partners if the debtor did not pay the firm. That, in my opinion, is not a guarantee within the statute. I think that to bring a promise within the statute the debt for which the Defendant has promised to answer must be a debt due to the person to whom the promise is made, and that the promise must be made to a person who could bring an action for the debt.

Secondly, assuming that the testator's undertaking was a guarantee within the meaning of the statute, I am clearly of opinion that there was a sufficient memorandum in writing to satisfy the statute. It is shewn by a *catena* of cases down to *Gibson* v. *Holland* (1) and *Wilkinson* v. *Evans* (2), that the question is not one of intention of the party who signs the document, but simply one of evidence against him. The Court is not in quest of the intention of parties, but only of evidence under the hand of one of the parties to the contract that he has entered into it. Any document signed by him and containing the terms of the contract is sufficient for that purpose. In *Bailey* v. *Sweeting* (3) a letter to an agent of the person sought to be charged was held sufficient, and whether it is a letter to an agent or to a friend is immaterial. A will is not only a document signed by the testator, but a document signed very solemnly; but I lay

(1) Law Rep. 1 C. P. 1. (2) Law Rep. 1 C. P. 407. (3) 9 C. B. (N.S.) 843.

C. A. 1892 *In re* HOYLE. HOYLE *v.* HOYLE.

no stress on that, for any document signed by the party to be charged will do.

A. L. SMITH, L.J.:—

The first question is whether this was an agreement coming within the 4th section of the *Statute of Frauds*; and the second, whether, if so, there is a note or memorandum sufficient to satisfy the statute.

As regards the first question, I do not differ from my Brethren. The question is whether it is a promise to pay the firm if the son does not, and so a promise to answer for the debt of another. The agreement seems to me to be very near the line; but it is not necessary to decide the point, as I clearly agree with them upon the second question.

As regards this, I am of opinion that, supposing the agreement to come within the statute, there is a sufficient memorandum. It is settled by *Laythoarp* v. *Bryant* (1) and *Leroux* v. *Brown* (2) that the statute does not affect the contract, but only relates to the evidence of it. The statute enacts that no action shall be brought upon a promise of a certain description unless there is a note or memorandum thereof signed by the party to be charged. A letter to a third party has been held enough; an affidavit made in a different matter has been held to suffice; and I should say that an entry in a man's own diary, if it were signed by him and the contents were sufficient, would do. The question is not what is the intention of the person signing the memorandum, but is one of fact, viz., is there a note or memorandum of the promise signed by the party to be charged? Here the testator by his will, which he signs, recites the guarantee sued on. The contents of the statement are sufficient, and why is this not a memorandum in writing signed by the party to be charged? I say that it is.

Solicitors: *Patersons, Snow, Bloxam, & Kinder; Nash, Field, & Withers*, agents for *Hoyle, Shipley, & Hoyle, Newcastle-upon-Tyne.*

(1) 2 Bing. N. C. 735. (2) 12 C. B. 801.

H. C. J.

C. A.
1892
NORTH, J.
July 13, 14.
C. A.
Nov. 15.

In re CHAMPION. DUDLEY *v.* CHAMPION.

[1891 C. 677.]

Will—Construction—Devise of House and Land "now in my own occupation" —Land subsequently acquired by Testator and occupied by him with the House—Subsequent Codicil confirming Will—Wills Act (1 *Vict. c.* 26), *s.* 24 [*Revised Ed. Statutes, vol. viii., p.* 34]*—Mortgage of subsequently-acquired Land by Testator's Heir—Sale by Mortgagee—Right of Beneficiaries under Will to follow Purchase-money.*

A testator by his will made in April, 1873, devised a freehold cottage with all the land thereto belonging, described as "now in my own occupation," to two trustees upon trust for his wife during her life and after her death for his children, who were five in number, in equal shares. In September, 1873, the testator purchased two fields adjoining the cottage and occupied them with the cottage till his death. In 1877 he made a codicil by which he substituted his wife and his two sons as trustees and executors of his will, and confirmed his will in other respects. The testator died soon after the execution of the codicil, and the will and codicil were proved by his widow and one of his sons, who was his heir-at-law. In 1885 a deed was executed by the widow and the heir-at-law by which, in consideration of £75 expressed to have been advanced to the widow and the heir-at-law, the heir-at-law "as beneficial owner" conveyed the two fields purchased by the testator in 1873 to *Chapman*, a solicitor, in fee by way of mortgage. *Chapman* had notice of the contents of the will and codicil, but was advised that the two fields did not pass by them, but descended to the heir-at-law. In 1890 *Chapman*, under his power of sale as mortgagee, sold the two fields for £300 freed from the mortgage. An action having been brought by the testator's three daughters against the heir-at-law and *Chapman*:—

Held (affirming the decision of *North*, J.) (1.), that on the true construction of the will and codicil the two fields passed to the trustees with the cottage; (2.) that the Plaintiffs had a right to adopt the sale and to follow the purchase-money in the hands of *Chapman*; but that *Chapman* was entitled to retain his costs of the sale as mortgagee, and any part of the mortgage money which he could shew to have been advanced for the purposes of the trust estate.

CHARLES CHAMPION, by his will, dated the 9th of April, 1873, in which he described himself as "of the *Orchard Cottage, Holmwood*, in the parish of *Dorking*," after directing the payment of his debts, funeral, and other expenses, gave and devised "the whole of my said freehold *Orchard Cottage*, with all the land, outbuildings, and appurtenances thereto belonging, situate, lying,

C. A. 1892 *In re* CHAMPION. DUDLEY *v.* CHAMPION.

and being in the said parish of *Dorking*, and now in my own occupation," to *Frederick Child* and *H. E. Turner*, his executors and trustees thereinafter named, to have and to hold the said freehold cottage and premises, upon trust to permit his wife, *Mary Champion*, to have full possession, management, and control "of the whole of my said freehold cottage, land, outbuildings, and appurtenances thereto belonging," in any way or manner she might think proper during the time of her natural life. And from and after her decease the testator did thereby empower and direct his said executors or executor for the time then being to sell the said cottage and premises as therein mentioned, and that the money arising from the said sale, after deducting all legal and necessary expenses, should be applied in aid of his residuary estate as he should thereinafter direct. He also gave and bequeathed to his said executors and trustees the whole of his personal estate and effects, wheresoever and whatsoever, which he should die possessed of or entitled to, or which should or might in any way be due, owing, or belonging to him at the time of his decease, upon trust that his executors or executor for the time then being should permit his said wife to select any part or the whole of his household furniture and other effects for her use and benefit during her life, and the remaining part thereof (if any) sell and convert into money, and collect, get in, and receive all such part of his personal estate as did not consist of money and securities for money, and invest the same as therein mentioned, and the interest and profits arising therefrom pay over to his said wife from time to time as the same should become due, so that she might have the sole and full benefit of the profits and interest arising "from the whole of both my real and personal estate" during her life. And after her decease he thereby empowered and directed his said executors or executor for the time being to sell and convert all that part of his personal estate and effects selected and reserved for the use and benefit of his said wife in her lifetime, and collect and get in all moneys, either placed out on security or any money due to his estate, "as also the money arising from the sale of my real estate before named"; and, after deducting all reasonable and necessary expenses, to divide the whole residue between and among all his

children in equal shares and proportions, share and share alike to whom, or to their respective legal representatives, he gave and bequeathed the same as their own proper moneys for ever. And the testator thereby appointed the said *Frederick Child* and *H. E. Turner* to be joint executors and trustees of his will.

On the 27th of September, 1873, the testator purchased the fee simple of two fields adjoining the *Orchard Cottage* mentioned in his will; and thenceforth during the remainder of his life he occupied those two fields as appurtenant to the *Orchard Cottage.*

On the 22nd of October, 1877, the testator made a codicil to his will in the following terms: "I, *Charles Champion,* of the *Orchard Cottage, Holmwood,* in the parish of *Dorking,* declare this to be a codicil to my last will, dated the 9th of April, 1873. Whereas I have by my said will devised and bequeathed my real and personal estate, and given certain powers, to *Frederick Child* and *H. E. Turner* as trustees, and appointed them executors; now I revoke my said will, so far as the said *Frederick Child* and *H. E. Turner* are objects thereof, and substitute my wife, *Mary Champion,* and my sons, *Caleb Champion* and *Clement Champion,* in their place. And I declare that my said will shall take effect in the same manner as if the names of the said *Mary Champion, Caleb Champion,* and *Clement Champion* had been originally inserted throughout the said will instead of the names of *Frederick Child* and *H. E. Turner.* And I confirm my said will in other respects."

The testator died on the 27th of October, 1877, and his will and codicil were, on the 27th of December, 1877, proved by *Mary Champion* and *Caleb Champion,* power being reserved to make a grant of probate to *Clement Champion.*

Up to the date of the issue of the writ in the action *Clement Champion* had not acted in the trusts of the will.

The testator left surviving him his widow, *Mary Champion,* and five children—viz., the two sons, *Caleb Champion* and *Clement Champion* (of whom the former was his heir-at-law), and three daughters, all of whom were married when this action was commenced. They and their respective husbands were the Plaintiffs.

The testator had in his lifetime mortgaged *Orchard Cottage,* and the land originally belonging thereto, to a Mr. *Benecke.*

On the 14th of July, 1885, a deed was executed between *Caleb*

C. A. 1892 *In re* CHAMPION. DUDLEY *v.* CHAMPION.

Champion of the first part, *Mary Champion* of the second part, and *J. J. Chapman* of the third part. This deed contained a recital that *Chapman* had already advanced to *Caleb Champion* and *Mary Champion* £75, and that it had been agreed at the time the advance was made that the sum, with interest, should be secured to him in manner thereinafter appearing. And it was witnessed that, in pursuance of the agreement and in consideration of the £75, *Caleb Champion* and *Mary Champion* thereby covenanted with *Chapman* to pay the £75 on the 14th of January, 1886, with interest in the meantime, and also so long after that time as the £75, or any part thereof, should be owing, to pay interest thereon half-yearly. And it was further witnessed that for the consideration aforesaid *Caleb Champion*, as beneficial owner, did thereby convey to *Chapman* the two pieces of land at *Holmwood*, which the testator had purchased in September, 1873, to hold to *Chapman* in fee simple, subject to a proviso for redemption on payment of the £75, with interest, on the 14th of January, 1886.

On a plan contained in a prior deed these two pieces of land were coloured pink, and in the same plan the *Orchard Cottage* and the land originally attached thereto were coloured green.

At the time of the execution of the deed of the 14th of July, 1885, *Chapman*, who was a solicitor, had notice of the contents of the testator's will and codicil, and was aware that upon their construction there was some doubt whether the two pieces of land coloured pink did or did not pass by the will and codicil; but he was advised that they did not pass.

On the 31st of December, 1888, *Mary Champion* died.

In June, 1890, *Chapman*, as mortgagee, joined with *Benecke* in selling the green land and the pink land together for one sum of £900. An arrangement was made by which £600 was treated as the price of the green land and £300 as the price of the pink land, and the £300 was accordingly received by *Chapman*, and on the 12th of July, 1890, he executed a deed by which he purported, in consideration of £300, to convey the pink land to the purchaser in fee, freed from his mortgage.

The action was brought by the other children of the testator against *Caleb Champion* and *Chapman*.

The Plaintiffs claimed a declaration that the Defendants were jointly and severally liable to make good to the testator's estate the said sum of £300, together with interest thereon at 4 per cent. per annum from the 12th of July, 1890, and to have such liability enforced accordingly.

The Defendant *Caleb Champion* delivered a statement of defence; but he did not appear at the trial of the action. He had been in February, 1888, adjudged a bankrupt.

The action came on for hearing before Mr. Justice *North* on the 13th of July, 1892.

MacSwinney, for the Plaintiffs:—

By sect. 24 of the *Wills Act*, a will, as regards the property comprised in it, is to be construed to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will. There is nothing here to shew a contrary intention, and therefore the devise of *Orchard Cottage*, with all the land, &c., thereto belonging, "and now in my own occupation," passed the two pieces purchased by the testator in September, 1873, and occupied by him at the time of his death with *Orchard Cottage*: *In re Portal & Lamb* (1). Even under the old law the confirmation of the will by the codicil would have made the devise in the will operate as from the date of the codicil. The testator's heir had, therefore, no title to the two pieces of land purchased in 1873, and could confer no title on *Chapman*.

The Plaintiffs are entitled to affirm the sale by *Chapman*, and to follow the purchase-money in his hands, he having taken his mortgage with notice of the Plaintiffs' title under the will.

Brice, Q.C., and *Ribton*, for the Defendant *Chapman*:—

There is no devise of the pieces of land purchased in 1873. The words "and now in my own occupation" shew a contrary intention within the meaning of sect. 24. The word "now" refers to the date of the will: *Hutchinson* v. *Barrow* (2); *Williams* v. *Owen* (3); *Goodlad* v. *Burnett* (4). If at the date of the will

(1) 27 Ch. D. 600; 30 Ch. D. 50.
(2) 6 H. & N. 583.
(3) 2 N. R. 585.
(4) 1 K. & J. 341, 348.

C. A. 1892 *In re* CHAMPION. DUDLEY *v.* CHAMPION.

the testator had owned these two pieces of land, but they had not been in his own occupation, they would not have passed under the devise; *à fortiori* they do not pass when he was neither owner nor occupier.

At the date of the codicil the two pieces of land were in the testator's occupation; but the only object of the codicil was to change the trustees. The confirmation of the will does not of itself bring down the will to the date of the codicil: *In re Edwards* (1). This is not like the case of a general devise.

At any rate, the Plaintiffs' only remedy is against the land in the hands of the purchaser: they have no remedy against *Chapman*. A mistake as to the construction of the will is not a mistake of law: *Earl Beauchamp* v. *Winn* (2). A mortgagee can be called on to account only by his mortgagor. The Court will will not force a doubtful title on a purchaser. In construing a deed the Court will act on the principle that a man is to be presumed to have done only that which he had a right to do: *Faussett* v. *Carpenter* (3). It will be presumed that a trustee did not intend to commit a breach of trust. The heir conveyed only what was vested in him "as beneficial owner," *i.e.* his beneficial interest.

[NORTH, J.:—I know by the evidence that both the heir and the purchaser were advised that the two closes did not pass by the will. It is idle to ask me to hold that the deed did not operate as every one intended that it should.]

At any rate, the joint tenancy was severed, and only one-third of the land passed by the mortgage deed. The Defendant *Chapman* sold only what he took under the mortgage.

If the Plaintiffs can ratify the sale at all, they must ratify it in its entirety.

NORTH, J.:—

The first question is as to the construction of the will, and I am in favour of the Plaintiffs' contention on three different grounds.

(1) 63 L. T. (N.S.) 481. (2) Law Rep. 6 H. L. 223, 234.
(3) 2 Dow & C. 232.

The will was made in April, 1873. At that time the testator was in possession of the property called "The *Orchard Cottage*," including the whole of the land coloured green on the plan, and he had also some interest in the land coloured pink, for the evidence shews that he had to cross it in order to go to a well from which the supply of water for the house was obtained. He subsequently purchased the pink land, and it was conveyed to him; but I assume that he was not in occupation of the pink land when he made his will. But he certainly acquired the legal estate in the pink land, and obtained possession of it, later in the same year, and he remained in occupation of both the green and the pink lands down to the time of his death. By his will he devised "the whole of my said freehold *Orchard Cottage*, with all the land, outbuildings, and appurtenances thereto belonging, situate, lying and being in the said parish of *Dorking*, and now in my own occupation," to his trustees. It is not disputed that if the words down to "in the parish of *Dorking*" had been used without any addition they would have passed, not only the green land which the testator had at the time, but also the pink land which he afterwards acquired. Do then the words "and now in my own occupation" make any difference? If they are an essential part of the description, if you cannot arrive at the description of that which is devised without those words, then the two pieces of pink land will not pass by the will, because at the date of the will they were not in the testator's own occupation. But is that the meaning of the words? I do not think it is. In the first place, there is, without them, a sufficiently complete description of "*Orchard Cottage*, with all the land, outbuildings, and appurtenances thereto belonging, situate, lying, and being in the said parish of *Dorking*." Are the words "and now in my own occupation" a mere additional description which, though inaccurate, is not vital, or are they an essential part of the description, so that the whole constituted a gift of only "such lands in the parish of *Dorking* as are now in my own occupation"? In my opinion, the words "and now in my own occupation" are not a vital part of the description. They only add an incidental description which does not qualify the generality of the previous words. Suppose the gift had been of "all my land in

C. A. 1892 *In re* CHAMPION. DUDLEY *v.* CHAMPION. North, J.

Dorking which is of freehold tenure," then the being freehold would have constituted an essential part of the description, and the gift would not have passed anything but freehold land, though a small piece of leasehold or copyhold land might have been mixed up with the freehold. But, if the testator had given his *Orchard Cottage* and land, and had added "which is of freehold tenure," and it had turned out that a small piece of the site of the house or of the curtilage was not freehold, but was copyhold or leasehold, can there be any doubt that that small piece would have passed? Without a doubt it would have passed. But, if the words were an essential part of the description, it would not have passed.

Now look at the will so far as I have read it. I do not think the words "and now in my own occupation" are a vital part of the description. They are additional. They are connected by the word "and" with the prior description, and, in my opinion, they do not qualify that which has gone before. Therefore, stopping at those words, in my opinion, if they had stood alone, the pink land which the testator afterwards acquired would have passed by the will.

But the second ground for my decision is this: that, even assuming the construction of the devise taken *per se* to be against the Plaintiffs and in favour of the Defendants, great light is thrown upon the testator's meaning by the subsequent part of the will. He clearly intended to dispose of all the property he had. [His Lordship read the subsequent part of the will and continued:—]

The words seem to me to shew clearly, in aid of the construction of the particular devise, that the testator intended to dispose of the whole of his real estate.

Then my third ground is based on the codicil, which seems to me to be in favour of the Plaintiffs in two ways. It was made in 1877, long after the testator had purchased and entered into the occupation of the pink land, and he says: "I declare this to be a codicil to my last will, dated the 9th day of April, 1873. Whereas I have by my last will devised and bequeathed my real and personal estate and given certain powers to *Frederick Child* and *Henry Edward Turner* as trustees, and appointed them

executors." This is, in my opinion, a recital that the testator has by his will devised and bequeathed all his real and personal estate. I do not think the words can be treated as equivalent to "some of my real and personal estate"; I think they mean all, and they aid the construction of the will itself.

But, then, further, we come to the final words of the codicil. After the recital which I have read, the testator proceeds to revoke the will so far as the two trustees are concerned, and to substitute his wife *Mary* and his two sons in their place, and he proceeds: "I declare that my said will shall take effect in the same manner as if the names of the said *Mary Champion, Caleb Champion,* and *Clement Champion* had been originally inserted throughout the said will instead of the names of *Frederick Child* and *H. E. Turner.* And I confirm my said will in other respects." What is the effect of those words of confirmation? It is settled by authority that the effect of such a phrase as "I confirm my will in other respects" is a republication of the will, and when, under the old law, a testator had made a will which would merely pass the property he had at the date of it, and then by a codicil he confirmed and republished his will, the effect was to bring down the date of the will to the date of the codicil, and to make the devise in the will operate in the same way in which it would have operated if the words of the will had been contained in the codicil of later date. There is ample authority on this point. There is, first, the case of *Beckford* v. *Parnecott* (1). Then there is *Barnes* v. *Crowe* (2). The marginal note is this: "A codicil duly attested to pass real estate, annexed by testator to his will of lands, is a republication of the will, and shall pass after-purchased lands, though not mentioned." The reports are quite clear on the point, and the marginal note in *Brown* is perfectly accurate. Then there is *Yarnold* v. *Wallis* (3). The marginal note is: "Lands purchased after the date of a will held to pass by a codicil made subsequently to their purchase; the codicil containing no expressions limiting the effect of the devise to lands comprised in the will." There the purchase was made after the will, and after that the codicil was executed, and it was

(1) Cro. Eliz. 493. (2) 1 Ves. 486; 4 Bro. C. C. 2.
(3) 4 Y. & C. Ex. 160.

C. A. 1892 *In re* CHAMPION. DUDLEY *v.* CHAMPION. North, J.

"to be taken as part of the will"; and the testator said: "I do hereby give and empower my son *William Yarnold*, when in the possession of the estates given to him by my will, to charge the same or any part thereof," with a jointure for his wife. It was held that the codicil passed the after-acquired property. Lord *Abinger*, C.B., in giving judgment, said (1): "Now, upon the words of this codicil, it is said, that the case is taken out of the general rule; that a codicil duly made to pass a testator's real estates amounts to a republication of the will, so as to make the will bear date with the codicil, and to affect all the lands the testator had at the time of the making of the codicil. That such is the general rule, I apprehend there is no doubt." Then he went on to deal with the argument that the circumstances were special, and he applied the rule which I have mentioned.

Then, again, there is *Doe* v. *Walker* (2). There the will was made in February, 1837, and by it the testator devised all his lands situate in the parish of *Great Bowden* to trustees, on certain trusts. The testator made a codicil in 1838, and, after reciting the devises and bequests contained in his will, and that he had since determined to appoint *C.* an additional trustee for the purposes in his will mentioned, he gave and devised all his messuages, lands, &c., described in and devised by his will, situate at *Great Bowden*, &c., and also the several sums of money therein mentioned, to *C.*, his heirs, executors, &c., upon the trusts in the will expressed and contained, and nominated him one of the executors of his will, and directed and declared that his will should be read and construed in the same manner, and should have the same operation and effect, as if *C.* had been appointed a trustee and executor together with and in addition to the other trustees, and in all other respects the testator ratified and confirmed his will. I quote this case because there the codicil was very like the codicil in the present case, and it was equally limited in expression. There it was held "that the will was republished by the codicil, and passed real estates purchased by the testator after the date of the will and of the codicil."

That case is not exactly in point, because the will was executed

(1) 4 Y. & C. Ex. 164. (2) 12 M. & W. 591.

before and the codicil after the date of the *Wills Act*; but I refer to it for the reason which I have mentioned, that the codicil was limited in its effect in the same way as the codicil in the present case.

By these cases it seems to me perfectly well settled that, if there were nothing else in favour of the Plaintiffs, the codicil makes the will take effect as if it had been executed at the date of the codicil; and in that case it is conceded, and there can be no doubt, that the land coloured pink would have passed under the will.

Then what has happened? A mistake as to the effect of the will has been made apparently by two persons; but they had the will before them, and, having made this mistake, they must take the consequences. Three trustees are appointed by the codicil; but *Clement Champion* never acted or proceeded to prove the will, until after the pleadings were closed and the action had been set down for trial. As to the effect of that I do not now express any opinion. Mrs. *Champion*, who has since died, and the Defendant *Caleb Champion* were the other two trustees; and it appears from the evidence that they had borrowed a sum of money from a person named *Down*, and they wanted to pay him off. I do not know whether the debt was or was not incurred on account of the testator's estate, and I have no present means of ascertaining that; but they wanted the money, and they applied to the Defendant *Chapman* to advance it to them. They wanted £60 and some interest, and he lent them £75, and he took security for that amount. He investigated the title, and he came to the conclusion that the two pieces of pink land had not passed by the testator's will. Though he lent the money to Mrs. *Champion* and *Caleb Champion*, taking a covenant from them for repayment, he took a security upon the pink land, which, as he has told me, and no doubt correctly, he, on investigation of the title, believed to belong to *Caleb Champion* as the testator's heir-at-law; and the deed of the 14th of July, 1885, by which *Caleb Champion* conveyed the property, was a mortgage by him to *Chapman* of property which the parties believed to belong to the mortgagor as heir-at-law to the testator, and it was a conveyance by him of the whole property "as beneficial owner"—that is, he covenanted

C. A. 1892 *In re* CHAMPION. DUDLEY *v.* CHAMPION. North, J.

for title to the whole of the property. It has been suggested that the conveyance "as beneficial owner" had the effect of passing only that of which he was, in fact, beneficial owner, and not of that which was vested in him as trustee, and that it did not affect the legal estate. In my opinion, that is not the meaning of the deed. He, as beneficial owner, conveyed the whole land; and not merely that part of it in which he was beneficially interested. The language is totally different from that, and the effect of it is clearly to convey the whole estate in consideration of the sum of £75. It is quite true, now that we know the real facts, that *Caleb Champion* had not got the whole, and that he could not vest the legal estate in its entirety in *Chapman*. All that *Chapman* took was such legal estate as could be conveyed (I do not wish to prejudice that question) by one of the two or three trustees, as the case might be. Then afterwards *Chapman*, being thus entitled, desired to have his money paid. As the mortgagee of the rest of the *Orchard Cottage* estate was about to sell the green land, *Chapman* thought, and no doubt wisely, that this would be a very good opportunity for realizing his security by the sale of the pink land with the green, inasmuch as they would sell far better together than separately. Steps were, therefore, taken for the sale, and the whole was sold for £900, and an arrangement was made under which £300 was taken as the purchase-money of the pink land, and £600 as that of the green land. That £300 was paid to *Chapman*, who was the vendor of the pink land. He says there was a deduction of £8 for expenses, to which, of course, he was entitled; but I speak of £300 as a convenient sum. The purchaser investigated the title. It was proposed at one time that the trustees of the will should join in the conveyance; but that was waived, and they did not join, and Mr. *Chapman* alone executed the conveyance to the purchaser, and the £300 was paid to him.

Now, according to the construction I have put on the will, the pink land belonged beneficially to the five children of the testator, three of whom are the Plaintiffs in the action, and they asked for their shares of the £300. Their right was disputed, and then they commenced this action, in which they ask a declaration that the £300 forms part of the testator's estate. Accord-

ing to my view of the construction of the will, the £300 is clearly the proceeds of land which formed part of the testator's estate. Why then should not the Plaintiffs have their shares of the proceeds of sale? It is true that the sale was not made by their direction. It may have been (and it is said that it was) made with their knowledge, or the knowledge of some of them. The contention now set up on Mr. *Chapman's* behalf comes to this: "I have nothing to do with the Plaintiffs. I was a mortgagee having £75 due to me. If I luckily sold for £300 the estate which I had no right to sell, let the persons who are interested in the property go to the purchaser and get the estate back from him. They have no right to look to me for the purchase-money." That, I think, is a dishonest contention. The result of it would be that, although only £75 was due to *Chapman*, and he sold the property for £300, he would be entitled to keep the surplus and put it into his own pocket. No doubt, he would say: "I must account for the surplus to the testator's heir-at-law, or the trustee in his bankruptcy, to whom the property sold does not belong, and the persons who are now found to be the true owners of the property cannot look to me who have the proceeds of its sale in my hands; but they must look to the purchaser, who has already paid the full price of the property. He must either give up the property without getting his money back, or he must pay the whole price over again." In my opinion, that would be neither law nor equity nor justice. The sale was indeed made by a person who was not authorized to sell on behalf of the Plaintiffs; but he has, in fact, sold property in which they were interested, and they have a right to adopt his act, and to say that the sale shall be treated as a valid sale. By so doing they are confirming the purchaser's title, and they have a right to say: "Although the proceeds of the sale were received by Mr. *Chapman*, they must be accounted for as part of the testator's estate." It has been suggested that *Chapman* has a claim first for the £75, and, secondly, for other sums which he has advanced to *Caleb Champion*. But he does not say that he advanced those other sums on security, and this property is not charged by the heir-at-law beyond the £75. As regards the balance beyond the £75, *Chapman* has no claim whatever against this property. If he

C. A. 1892 *In re* CHAMPION. DUDLEY *v.* CHAMPION. North, J.

has a claim against *Caleb Champion* personally, he must enforce it as best he can.

As to the £75, the matter stands somewhat differently. There is nothing to shew that this sum was borrowed on behalf of the testator's estate, or that it was applied in satisfying any liabilities of that estate. *Primâ facie* it was not, because the mortgage is by the heir-at-law of what he believed to be his own property, to secure money advanced to him and *Mary Champion*. But matters have been stated (though not yet proved) which make it possible that the money was borrowed by *Mary Champion* and *Caleb Champion* on behalf of the testator's estate; and, if that should turn out to be so, then I think that, as against the testator's estate, and particularly as against these proceeds of sale, Mr. *Chapman* would be entitled to a charge for what he advanced up to the amount mentioned in the deed, that is, £75 and interest. I am not deciding that point now; but in declaring, as I must do, that the £300 forms part of the testator's estate, I will do so expressly without prejudice to any claim which Mr. *Chapman* may be able to establish against the testator's estate, and as against this £300 in particular, in respect of his advance. I do not see that I can do anything more now. I am not administering the testator's estate. Mr. *Chapman* must pay the money into Court, and I will take care that it is not distributed until he has had an opportunity of shewing that he has a good charge against it in respect of the £75 and interest.

The following is an abstract of the judgment as drawn up by the Registrar:—

Declare that the two pieces of land formed, and that the net proceeds of sale thereof form, part of the estate of the testator. Order Defendant *Chapman*, within one month after service of judgment, to pay into Court the residue of the sum of £300, after deducting £8 3*s*. paid for auctioneer's charges, and also his taxed costs in selling as mortgagee. Order a proper person to be appointed a new trustee of the testator's will in lieu of the son *Caleb*. Order Defendant *Chapman* to pay the Plaintiffs' taxed costs of the action. Liberty to apply.

W. L. C.

C. A. From this judgment the Defendant *Chapman* appealed.

The appeal was heard on the 15th of November, 1892.

Brice, Q.C., and *Ribton*, for the Appellant, cited *Faussett* v. *Carpenter* (1).

Cozens-Hardy, Q.C., and *MacSwinney*, for the Plaintiffs.

Brice, in reply.

LINDLEY, L.J.:—

This case does not present much difficulty. The testator by his will devised a freehold cottage and the land and appurtenances thereto belonging, which he described as "now in my own occupation," to trustees upon certain trusts. After the date of his will he bought two other fields adjoining the cottage, and then he made a codicil shortly before his death by which he substituted other trustees for those named in his will, and confirmed his will in other respects. This codicil having been made after the purchase of the two fields, what is its effect upon the devise contained in the will? In my opinion, it is quite clear that the two fields, which as well as the cottage were in his own occupation when he made the codicil, passed to the trustees together with the cottage and its appurtenances. This was the first point argued, and on it there can be no doubt.

The second point is as follows: It appears that after the death of the testator, the testator's widow and *Caleb Champion*, who were the two acting executors and trustees, borrowed from the Defendant *Chapman* £75 on the security of the two fields, and *Caleb Champion*, who was the heir-at-law of the testator, as beneficial owner conveyed them to *Chapman* by way of mortgage in the usual way. What is the effect of this mortgage on the trust estate and on the persons beneficially interested in it? I should say that it had no effect at all, subject to this, that if the mortgagee can prove that any part of the sum of £75 was advanced for the benefit of the trust estate, he will be entitled to a charge on the property mortgaged to that amount. *Chapman* claims through *Caleb Champion*, who committed a breach of trust, and *Chapman* was a party to that breach of trust. The beneficiaries say, "What right had the trustees to mortgage our property?"

(1) 5 Bli. N. S. 75.

C. A. 1892 *In re* CHAMPION. DUDLEY *v.* CHAMPION. Lindley, L.J.

and I see no answer to that question. In my opinion the mortgage, except to the extent I have mentioned, is utterly worthless, and the property must be considered as free from the mortgage. *Chapman* has sold the property, and the rights of the *cestuis que trust* to the purchase-money is the same as to the land. They do not wish to follow the land, but they claim the purchase-money; and I think they are entitled to it, subject to what I have said, namely, that if any part of the £75 was advanced for the benefit of the trust estate, the mortgagee will be entitled to that amount. This was the view taken by Mr. Justice *North*, and I am of opinion that he was right. The appeal must therefore be dismissed.

BOWEN, and A. L. SMITH, L.JJ., concurred.

Solicitors: *Langhams; J. J. Chapman.*

M. W.

C. A. 1892 *Nov.* 15.

RYAN *v.* MUTUAL TONTINE WESTMINSTER CHAMBERS ASSOCIATION.

[1890 R. 2334.]

Specific Performance—Injunction—Covenant to Employ Servant to Perform Services—Contract, Performance of which Court cannot Superintend—Specific Performance of part of Contract.

The lease of a residential flat, in a block of buildings let in flats to several tenants, contained a covenant by which it was agreed and declared by and between the parties to the lease that the premises were let subject to the regulations made by the lessors with respect to (among other things) the duties of the resident porter, which were set forth in a schedule thereto. These regulations, in effect, provided that the block of buildings should be in charge of a resident porter, appointed by the lessors, who was to act as the servant of the tenants in the block, to be constantly in attendance either by himself or, in his temporary absence, by some trustworthy assistant, and to perform certain services specified by the regulations.

The lessors appointed to the situation of resident porter a man who was by avocation a cook. He for the most part employed boys and charwomen to perform his duties as porter, and absented himself from the premises every weekday for several hours for the purpose of acting as *chef* at a neighbouring club:—

Held (reversing the decision of *A. L. Smith*, J.), in an action by the

lessee against the lessors for breach of the covenant, that the Court could not grant an injunction to prevent continuance of the breach of the covenant or order specific performance of it.

APPEAL from the judgment of Mr. Justice *A. L. Smith*, sitting for Mr. Justice *Romer* (1).

The action was brought upon a covenant in a lease, by which the Defendants demised to the Plaintiff for twenty-one years a residential flat in a building known as *Westminster Chambers*, which was let in flats to several tenants. The covenant sued upon was as follows: "It is hereby agreed and declared by and between the parties hereto that the premises hereinbefore expressed to be hereby demised are taken by the lessee subject to the regulations made by the lessors with respect to the duties of the resident porter, and other matters for the general convenience of tenants. These regulations are set forth in the schedule hereunder written, and are to be considered as forming part of these presents. The lessors, however, reserve to themselves the right of altering and modifying the regulations (except in the case of the present lessee as to the supply of coal) from time to time as the convenience of the tenants or other special circumstances may render desirable." The schedule was, so far as material, as follows: "(1.) The property of the lessors is divided into seven distinct blocks, each having an entrance into *Victoria Street*, and the rooms in each block are, together with the entrance and staircase belonging to it, in charge of a resident porter appointed and removable by the lessors, but who shall be and act as the servant of the tenants of the several rooms in the block. (3.) Tenants have the right to the general services of the porter resident in their block within the scope of his general duties, as defined by rule 6. (4.) Tenants have the right to the special services of such porter, as defined by rules 8, 9, and 10. (6.) The general duties of the porter which the tenants are entitled to have performed for them free of extra charge are as follows: (*a.*) To be constantly in attendance in the section of the building committed to his charge, either by himself or, in his temporary absence, by some trustworthy assistant. (*b.*) To cleanse every morning before 9 o'clock A.M. the general stairs, passages, lifts,

(1) [1892] 1 Ch. 427.

C. A. 1892 RYAN v. MUTUAL TONTINE WESTMINSTER CHAMBERS ASSOCIATION.

and entrances attached to the section, and to attend to the lighting and extinguishing of the gas therein. (*c.*) To receive and deliver to the several tenants all letters, parcels, and messages, and to receive the keys of the outer doors of the several sets of rooms from the tenants for safe custody, on their leaving for the night. (8.) The special services of the porter, which he is bound to render to the several tenants, if required, at a charge of 1*s.* 6*d.* per week for each room, comprise the cleaning and arrangement of such room, and the lighting of the several fires whenever required. (9.) Any extra services required of the porter by the tenants, and which are not inconsistent with his general duties, are to be the subject of special arrangement between them. (10.) Any services rendered by the porter will be rendered by him as the servant of the tenant, and for which, or the consequences whereof, the lessors will not be responsible."

The action was commenced on the 24th of December, 1890. The statement of claim alleged that since the date of the lease the Plaintiff had occupied the demised premises and paid his rent and performed his covenants, but that the Defendants had omitted and refused to appoint a resident porter to take charge of the block in which the Plaintiff's premises were situate, to be and act as the Plaintiff's servant according to the regulations in the schedule. The Plaintiff also alleged that a porter had been appointed by the Defendants, but that such porter was not constantly in attendance in the section of the building committed to his charge, either by himself or, in his temporary absence, by some trustworthy assistant, and that such porter had wilfully and persistently omitted and neglected to attend on the Plaintiff according to the said regulations, and to receive and deliver to the Plaintiff all letters, parcels, and messages; and that such porter had not been available when required for the Plaintiff to arrange with him for any extra services not inconsistent with his general duties. The Plaintiff claimed—(1.) an injunction against the Defendants to restrain them from employing as the porter in charge of the said block any person who is not resident and constantly in attendance therein, and able and willing to act as the servant of the Plaintiff, according to the regulations contained in the said schedule; (2.) specific performance of the

agreement to appoint a resident porter in charge of the said block; (3.) £100 damages for breaches of convenant.

The facts proved at the trial with regard to the alleged breach of covenant were as follows: The Plaintiff became lessee of the flat as from midsummer, 1889. There was only one other residential set of chambers in the block besides that of the Plaintiff; but there were several sets of business chambers in such block. In 1887 a man named *Benton* was appointed to the situation of porter, who, with his wife, resided on the premises. *Benton* was by avocation a cook, and at that time was acting as *chef* at a City hotel or restaurant, and continued so to act till July, 1889. From November, 1890, till August, 1891, he had, at the instance of the directors of the Defendant company, been employed from 11 A.M. to 3 P.M. on weekdays at a luncheon club at 3, *Victoria Street, Westminster*. He was at home on Sundays; but on that day an old woman usually acted for him in his duties as porter; and he was backwards and forwards on weekdays. He had the assistance of a lad in the performance of his duties, who, however, did not reside on the premises. It was proved by the Plaintiff and his witnesses that *Benton* rarely acted as porter; that the door was occasionally opened by his wife, or niece, or by a charwoman, but usually by a boy in his shirt-sleeves, and wearing an apron; and that boys and charwomen were the persons who really performed the duties assigned by the regulations to the porter.

The learned Judge gave judgment for the Plaintiff, concluding in these terms (1): "My judgment, is that the Defendants appoint a resident male porter pursuant to the covenant. I will grant an injunction, or decree specific performance of the covenant, if that is the more appropriate course; and in case it is held in the Court of Appeal that I ought not to have done so, I assess the damages down to date of action brought at £25." The judgment of the Court as drawn up between the parties was: (1.) The Court doth order that the Defendants be restrained from employing as a porter in charge of the block No. 7, *Victoria Street*, any person who is not resident and constantly in attendance therein, and able and willing to act as the servant of the Plaintiff according to the regulations contained or referred to in the lease.

(1) [1892] 1 Ch. 433.

C. A. 1892 RYAN v. MUTUAL TONTINE WESTMINSTER CHAMBERS ASSOCIATION.

(2.) The Court doth declare that the agreement contained or referred to in the lease to appoint a resident porter in charge of the said block, ought to be specifically performed, and doth order and adjudge the same accordingly.

Chadwyck Healey, Q.C., and *Swinfen Eady*, for the Defendants:—

The Defendants admit that there was a breach of contract for which they are liable in damages; but they contend that the case is not one in which either an injunction or specific performance can be given.

This is, in effect, a contract for personal services. It is, in substance, a contract that the Plaintiff shall have the benefit of the performance of certain services by the porter. It is a well-established rule that a Court of Equity will not interfere, either by way of injunction or by decree for specific performance, to compel performance of such a contract. See *per Jessel*, M.R., in *Rigby* v. *Connol* (1). There is no precedent for such an injunction as has been given in this case. This is not the case of a breach of a negative stipulation in a contract like *Lumley* v. *Wagner* (2). Any failure in performance of his duties by the porter during the term of the lease, however small, would be a breach of the order of the Court, and would subject the Defendants to attachment as for a contempt. The cases shew that the Court will not order the specific performance of contracts the execution of which would require such supervision as the Court is necessarily unable to give. The Court cannot undertake to supervise the performance by the porter of his duties. Suppose the Defendants appointed a porter, and took from him an agreement in writing to perform the duties specified in the lease. If he failed to do so, the Defendants could not obtain an order for specific performance against him. The Plaintiff is seeking to obtain against the Defendants an order to appoint a resident porter to do certain duties when the Defendants could not obtain from the Court an order against him that he should do his duty when appointed. The case is really within the rule which pre-

(1) 14 Ch. D. 482, 487. (2) 1 D. M. & G. 604.

vents the enforcement of contracts for personal service by injunction or decree for specific performance.

Another reason against granting an injunction or specific performance is, that there is an adequate remedy by action for damages. The case of *Wolverhampton and Walsall Railway Company* v. *London and North Western Railway Company* (1), upon which reliance was placed in the Court below, has really no analogy to the present case.

[They also cited *Whitwood Chemical Company* v. *Hardman* (2); *Brett* v. *East India and London Shipping Company* (3); *Pickering* v. *Bishop of Ely* (4).]

Haldane, Q.C., and *Warrington*, for the Plaintiff:—

It is not a question of enforcing performance of a contract for personal services as suggested. The Plaintiff has taken a lease of these premises for twenty-one years, on the term that a resident porter should be engaged; and the Defendants are seeking to repudiate that term altogether, and refuse to appoint a porter such as is described in the lease. In substance, what the learned Judge ordered in the Court below was that the Defendants should appoint a resident porter, whose duty it should be to do the things mentioned in the lease; and there is no objection to such an order. The Court is not asked to decree performance by the porter of the services mentioned in the lease; and whether the Court would interfere if, after a proper porter had been appointed, he did not perform the services specified, is not now in question. The contract is severable. It is, in effect, two contracts, or a contract for two separate things. There is an agreement to appoint a porter to perform certain services, and an agreement that when appointed he shall perform them. In such a case, the Court, in order to do justice, can separate the two parts of the contract, and compel performance of the agreement to appoint a proper porter: *Rigby* v. *Great Western Railway Company* (5). What the learned Judge in the Court below meant to do, as appears from the report, was to compel the appointment of such

(1) Law Rep. 16 Eq. 433.
(2) [1891] 2 Ch. 416.
(3) 2 H. & M. 404.
(4) 2 Y. & C. Ch. 249.
(5) 15 L. J. (Ch.) 266.

C. A. 1892 RYAN v. MUTUAL TONTINE WESTMINSTER CHAMBERS ASSOCIATION.

a porter as is described by the lease. The words referring to his duties must be taken as merely descriptive. If there was any error of form in the judgment as drawn up, the Defendants' proper course was to apply to the Judge for a variation of the terms of the order.

Secondly, this case comes within the principle of the cases, in which the Court has, by injunction, compelled a railway company which has taken land on condition of performing certain works to do such works. In such cases Courts of Equity, in order to do justice where damages would have been an inadequate remedy, have moulded the principles on which they act to meet the exigencies of the particular case. They have treated these cases as exceptions to the rule that the Court will not supervise the execution of works, and have granted injunctions, which indirectly had the effect of compelling performance of the contract: see *per* Lord *Eldon* in *Lane* v. *Newdigate* (1), and *James*, V.C., in *Wilson* v. *Furness Railway Company* (2); *Storer* v. *Great Western Railway Company* (3). Here the Plaintiff has entered on premises for residential purposes and become bound by the lease in reliance on the agreement that a porter should be employed to perform certain necessary duties, and the right to bring successive actions for damages for breaches of the agreement is not practically an adequate remedy. The equitable jurisdiction of the Court to compel performance of a contract is, after all, discretionary, and ought not to be bound by absolutely rigid rules. It must depend on the circumstances of the case. This is a new case, and in order to do justice the Court ought to treat it as an exceptional case, like the railway cases which have been referred to.

LORD ESHER, M.R.:—

I do not think that the points on which we are about to decide this case were brought so fully before the learned Judge below as they have been before us. It seems to me that this case comes within one or the other, according to the point of view from which it is regarded, of two well-recognised rules

(1) 10 Ves. 192. (2) Law Rep. 9 Eq. 28.
(3) 2 Y. & C. Ch. 48.

of Chancery practice, which prevent the application of the remedy by compelling specific performance. I do not myself put this case as coming within any rule as to contracts to perform personal services. It is not necessary for me therefore to express any opinion as to such a rule. The contract sought to be enforced here is not a contract with a person employed as a servant. It is a contract between a person who has to employ a servant and a person for whose benefit the employment of such servant is to take place. It is a contract between a landlord and his tenant, by which the former undertakes to employ a porter to perform certain services for the benefit of the latter. The contract, therefore, is not merely that the landlord shall employ a porter, but that he shall employ a porter who shall do certain specified work for the benefit of the tenant. That is, in my opinion, one indivisible contract. The performance of what is suggested to be the first part of the contract, viz., the agreement to employ a porter, would be of no use whatever to the tenant unless he performed the services specified. The right of the tenant under the contract is really an entirety, viz., to have a porter employed by whom these services shall be performed; and the breach of the contract substantially is that these services were not performed. The contract is that these services shall be performed during the whole term of the tenancy; it is therefore a long-continuing contract, to be performed from day to day, and under which the circumstances of non-performance might vary from day to day. I apprehend, therefore, that the execution of it would require that constant superintendence by the Court, which the Court in such cases has always declined to give. Therefore, if the contract is regarded as a whole, there is good ground for saying that it is not one of which the Court could compel specific performance. It was contended that the Court could grant specific performance of the Defendants' obligation to appoint a porter. But then the case is brought within another rule, viz., that, when the Court cannot compel specific performance of the contract as a whole, it will not interfere to compel specific performance of part of a contract. That clearly appears to be a rule of Chancery practice on the subject. Therefore, if it

C. A. 1892

RYAN v. MUTUAL TONTINE WESTMINSTER CHAMBERS ASSOCIATION.

Lord Esher, M.R.

is urged that what the Judge has ordered to be performed is merely the obligation to appoint a porter, the case falls within that rule, and on that ground his decision must be reversed. It was argued that the case of *Rigby* v. *Great Western Railway Company* (1), shewed that a contract such as this might be severed, and that performance of part of it could be enforced. But that is not what the case appears to have decided. It decided that, where in one contract there were really several wholly independent stipulations, the Court could grant specific performance of one of them. It is no authority for the proposition that the Court can separate part of what is really one single indivisible contract and grant specific performance of that part. Then it was said that this case fell within the exception which has been established in the railway cases. That is admitted to be an exception grafted upon the Chancery jurisdiction by decisions, in which the Court, for the reasons stated, treated cases where railway companies had taken land on condition of doing works as exceptional, and granted specific performance. But being admittedly exceptions, these cases do not do away with the general rule, which appears to be applicable to the case before us. The language used by *James*, V.C., in *Wilson* v. *Furness Railway Company* (2), was cited to us as an authority to shew that the Court ought in this case to grant specific performance. That language, as applied by the counsel for the Defendants, is really cited as an authority for the proposition that the Court of Chancery will always, regardless of any rules, do what the justice of the particular case requires. But the answer is that the Court of Chancery has never acted on any such proposition. Then the judgment of Lord *Eldon* in *Lane* v. *Newdigate* (3) was cited, in which that learned Judge appears on that occasion to have deliberately held that the Court ought to do indirectly that which it had no power to do directly. That is a doctrine that I, for one, must decline to follow. It appears to me that the appeal must be allowed, and the judgment for the Plaintiff must stand only for the damages found by the learned Judge.

(1) 15 L. J. (Ch.) 266. (2) Law Rep. 9 Eq. 28.
(3) 10 Ves. 192.

LOPES, L.J.:—

There are two grounds on which I think that equity would not grant such relief as is claimed in this case. The first of those grounds is this. This, in my opinion, is an entire covenant. The meaning of the contract appears to me to be that the lessors will employ a man to act for the lessees competent to perform the duties of a porter, who shall be in constant attendance, and whose duties during his occasional absence shall be performed by an efficient substitute. That being so, the question arises whether that is an entire contract, or one that may be severed into two parts; or, perhaps, I should rather say, whether it is one contract or two? It was argued that there were two contracts. I do not think that view can be sustained. It was said that one portion of the contract was a contract to appoint a porter. But the appointment of a porter by itself would be utterly useless. What benefit would that be to the lessee? What was contracted for was not the mere appointment of a porter who might be useless, but the employment of a competent porter who should perform the specified duties. I think that it is an entire contract. If that be so, it is clear that it is such a contract that, in order to give effect to it by an order for specific performance, the Court would have to watch over and supervise its execution. But it is a recognised rule that the Court cannot enforce a contract by compelling specific performance, where the execution of the contract requires such watching over and supervision by the Court. It is another rule that the Court will only interfere by way of compelling specific performance, where it can give specific performance of the contract as a whole; and that it will not interfere to compel specific performance of part of an entire contract. On that ground, I think the remedy asked for cannot be given. Another ground on which the Plaintiff fails, in my opinion, is this. The Court will not compel specific performance when there is another adequate remedy. Here there is such a remedy, viz., by compensation in damages for breach of the contract. The Judge has found 25*l.* to be adequate damages in respect of the breach of the contract up to the time of action brought. But there does not appear to be anything to prevent the Plaintiff from bringing fresh actions

C. A. 1892

RYAN v. MUTUAL TONTINE WESTMINSTER CHAMBERS ASSOCIATION.

for future breaches of the covenant, and obtaining in this way an adequate remedy.

KAY, L.J.:—

I agree. This remedy by specific performance was invented, and has been cautiously applied, in order to meet cases where the ordinary remedy by an action for damages is not an adequate compensation for breach of contract. The jurisdiction to compel specific performance has always been treated as discretionary, and confined within well-known rules. In this case the Plaintiff is the lessee of a flat, which forms portion of a large building. In the lease is a covenant to the effect that the premises are taken by the lessee subject to certain regulations made by the lessors with respect to the duties of the resident porter and other matters, which are set out in a schedule. By the schedule it is stated that the building is divided into blocks, and the rooms in each block are, together with the entrance and staircase belonging to it, in charge of a resident porter, appointed and removeable by the lessors, but who shall be and act as the servant of the tenants of the several rooms in the block. The tenants are to have the right to the general services of the porter resident in their block within the scope of his general duties, as defined by rule 6. They are also to have the right to the special services of such porter, as defined by rules 8, 9, and 10. The Plaintiff's right under this covenant appears to me to be to have the advantage of the performance of the specified duties by the resident porter. In this case a man was appointed as porter, and held office; the complaint really was that he was not a proper porter, and that the tenant did not get the advantage of the services stipulated for in the schedule; that he was not constantly in attendance; but, being engaged elsewhere, was not on the premises as much as he should be; and that, when he was there, he did not perform his duties himself. When one looks at that which was the real gravamen of the action, the contention seems rather odd that we ought to divide the contract into two parts—one that a porter should be appointed, the other that he should perform the duties specified. The lessors' covenant being in substance that the lessee should have the advantage of the

performance of certain services by the porter, a covenant which I cannot conceive to be divisible, as was ingeniously suggested, the Plaintiff's claim is shaped thus. It is alleged that the lessee took possession under the lease, but that a proper porter was not appointed, and the lessee does not get the advantage of the performance of the porter's duties. He therefore asks for some remedy by means of which he may have these duties performed. That is really the nature of the action. But now it is sought to overlook that, and to say that, though a contract that the lessee shall have the benefit of the performance by the porter of his duties is not the sort of contract of which the Plaintiff can have specific performance, yet he can claim to have the contract performed specifically to this extent: he can ask the Court to compel the appointment of a proper porter, though, when he is appointed, the Court is not asked to compel performance of his duties. As I have said, the contract is really a single contract —viz., that the Plaintiff shall have the advantage of performance by the porter of his duties; and I dissent entirely from the notion that this contract can be divided into two parts in the way suggested, and the Court asked to grant specific performance of one part, but not of the other.

There are, no doubt, certain cases where a contract may be treated as divisible for the purpose of specific performance. The common case is where there is a contract like that in *Lumley* v. *Wagner* (1); in which case the contract was to sing for the plaintiff, and also not to sing for others. The Court says in such cases, though we cannot enforce performance of the contract to sing for a particular person, and so cannot enforce the whole contract; nevertheless, there being the independent negative stipulation against singing for others, we can enforce that by injunction. In the case of *Lumley* v. *Wagner*, the Lord Chancellor, in the passage which I cited in *Whitwood Chemical Company* v. *Hardman* (2), expressly said that, if he had had to deal with the affirmative covenant only, that the defendant would sing for the plaintiff, he would not have granted an injunction. That is one exception to the rule.

There is another exception to the general rules as to specific

(1) 1 D. M. & G. 604. (2) [1891] 2 Ch. 416.

C. A. 1892 RYAN v. MUTUAL TONTINE WESTMINSTER CHAMBERS ASSOCIATION. Kay, L.J.

performance. Ordinarily the Court will not enforce specific performance of works, such as building works, the prosecution of which the Court cannot superintend; not only on the ground that damages are generally in such cases an adequate remedy, but also on the ground of the inability of the Court to see that the work is carried out: *Blackett* v. *Bates* (1); *Powell Duffryn Steam Coal Company* v. *Taff Vale Railway Company* (2). An exception to this rule has been established in cases where a railway company has taken lands from a landowner on the terms that it will carry out certain works. In those cases, because damages are not an adequate remedy, the Court has gone to great lengths, and has granted specific performance of the definite works—they must be definite works—which the company that has taken the lands has contracted to do. This case does not come within either of the exceptions to which I have alluded. Therefore, for the reasons stated by the Master of the Rolls, this case is not one in which the Court could compel specific performance.

There appears to me to be also another reason for our decision which is quite sufficient. At the time when the action was brought there had been a breach of covenant. The learned Judge found no difficulty in assessing damages for breach of the contract down to that time. Why should there be any difficulty with regard to future breaches of contract? I have heard no sufficient reason adduced in the argument. If for the breach of contract down to action brought adequate compensation may be given by damages, that appears to me to be a reason for the Court not exercising its extraordinary jurisdiction. A sufficient reply to this argument is not afforded by the mere fact that these damages are not compensation for future breaches of the contract. If that were sufficient, I cannot conceive of any case of a continuing contract where specific performance might not be granted. For these reasons I differ respectfully from the learned Judge, and think that nothing but a judgment for the damages found by him should be given.

Solicitor for Plaintiff: *E. F. M. Ryan.*
Solicitors for Defendants: *Troutbeck & Barnes.*

(1) Law Rep. 1 Ch. 124. (2) Law Rep. 9 Ch. 331.

E. L.

In re DOODY. FISHER *v.* DOODY. HIBBERT *v.* LLOYD.

[1889 H. 1418.]

C. A.
1892
STIRLING, J.
June 16; *Aug.* 9.
C. A.
Nov. 16.

Solicitor—Costs—Taxation—Mortgage—Solicitor one of the Mortgagees—Sale of Mortgaged Property—Foreclosure Action—Solicitor Mortgagee's Firm acting for Mortgagees.

Held, by *Stirling*, J., and by the Court of Appeal, that a solicitor mortgagee acting as solicitor for himself and his co-mortgagee cannot charge any profit costs against the mortgagor, either as to proceedings in an action, or business done out of Court.

But *held*, by *Stirling*, J., that in principle there is nothing to prevent a partner of the solicitor mortgagee from receiving remuneration for his trouble, and in the absence of any agreement that the solicitor mortgagee is not to share in the profits arising from the transaction in question, the proper course is to ascertain what the profit costs are, and then to allow the other partner the same share in them as he is entitled to in the general profits of the partnership business. This was not appealed from.

In re Donaldson (1) and *Cradock* v. *Piper* (2) observed upon.

THERE were two summonses in these two actions, involving similar questions, and they were ordered to come on together.

In the action of *In re Doody, Fisher* v. *Doody*, the material facts were as follows:—

In the year 1858 *George Doody* borrowed £1200 of one *Liddle*, on the security of a legal mortgage of real estate, created by an indenture dated the 30th of March, 1858. In 1887 *Liddle* gave notice to pay off the debt, and, in consequence of such notice, it was arranged that the mortgage should be transferred to the Plaintiffs, *Henry Fisher* and *John Hodgkins*. Soon after the transfer *George Doody* died, and the Plaintiffs brought a creditor's action for administration of his estate, and obtained the usual administration judgment.

On the 30th of June, 1890, an order was made for the sale of the mortgaged property, and subsequently, on the 19th of February, 1891, a further order was made directing that the sale should be conducted out of Court, subject to a reserved price, and

(1) 27 Ch. D. 544. (2) 1 Mac. & G. 664.

C. A. 1892 *In re* DOODY. FISHER *v.* DOODY. HIBBERT *v.* LLOYD.

the auctioneer's charges being approved by the Judge, and directing also that the purchase-money should be received by the Plaintiffs, they undertaking to pay into Court the balance of purchase-money, if any, after payment and satisfaction of the sum due to them on their mortgage, such sum to be certified.

The sale took place, and for the purpose of ascertaining the balance mentioned in the order, the Plaintiffs carried in for taxation several bills of costs, and, in particular, two bills of costs due to Messrs. *Fisher* and *Hodges*, of *Newport*, solicitors, one bill being for costs alleged to have been incurred on the occasion of the transfer of the mortgage to the Plaintiffs in 1887, the other being for costs alleged to have been incurred in carrying into effect the sale sanctioned by the order of the 19th of February, 1891.

In taxing these bills the Master disallowed all costs except costs out of pocket, on the ground that the Plaintiff, *Henry Fisher*, one of the mortgagees, was also a member of the firm of *Fisher* and *Hodges* by whom the costs claimed were charged. It appeared from an affidavit, which was filed by special leave after the matter was before the Taxing Master, that all the business charged for by Messrs. *Fisher* and *Hodges* in the bills in question (with the exception of a small part transacted by the Plaintiff *Henry Fisher* as steward of a manor) was transacted solely and exclusively by Mr. *Edward Hodges* (the partner of *Henry Fisher*) and the clerks of the firm, and not by or through *Henry Fisher* personally, and that *Henry Fisher* acted throughout simply as mortgagee or transferee jointly with his co-Plaintiff *John Hodgkins*.

The action of *Hibbert* v. *Lloyd* was a foreclosure action in which a judgment for foreclosure had been made. The Plaintiffs, *Leicester Hibbert* and *Thomas Dolling Bolton* were mortgagees, and on taxing their costs of the action the Master disallowed all profit costs on the ground that the Plaintiffs had been and were represented in the action by one of themselves—viz., *Thomas Dolling Bolton*, who was a solicitor.

The Plaintiffs in each of the two actions of *In re Doody, Fisher* v. *Doody* and *Hibbert* v. *Lloyd*, took out summonses to review the taxation, which summonses were adjourned into Court, and

came on for hearing before Mr. Justice *Stirling* on the 16th of June, 1892.

Hastings, Q.C., and *Prior*, for the Plaintiffs in *In re Doody*, *Fisher* v. *Doody* :—

If the Plaintiff, Mr. *Henry Fisher*, had not been a member of the firm by whom the business was transacted these profit costs would unquestionably have been properly charged, and the evidence shews that practically the whole of the business charged for was transacted by his partner.

Primâ facie, there was no reason why the firm should not be employed, and although if *Fisher* had been the sole mortgagee and had himself acted, he could not consistently with the authorities, have charged for his own trouble as against the mortgagor, the case is different when the trouble is taken by his partner. Why should not the partner be remunerated for his trouble? *Hodgkins* is liable to the firm for their bill. The principles applicable to the case of a trustee-solicitor, who voluntarily undertakes a fiduciary position are not applicable to the same extent to the case of a solicitor-mortgagee. A mortgagee in his character of mortgagee is not a trustee. There is no reason in this case why the usual course should not be adopted; and, on principle, the whole of the costs should be allowed just as if an entirely independent solicitor had been employed. In *In re Donaldson* (1) it was decided that where one of a body of mortgagees is a solicitor and acts as such in enforcing the mortgage security, he is entitled to charge profit costs against the mortgagor whether the mortgagees are trustees or not: and there is nothing in the current of authority inconsistent with this: *In re Wallis* (2); *Allen* v. *Jarvis* (3); *In re Park* (4); *Cradock* v. *Piper* (5); *In re Corsellis* (6); *Stone* v. *Lickorish* (7).

Micklem, for the Defendant in *In re Doody*, *Fisher* v. *Doody* :—

The principle applicable to the profit costs of a solicitor mortgagee is analogous to that on which the profit costs of a solicitor

(1) 27 Ch. D. 544.
(2) 25 Q. B. D. 176.
(3) Law Rep. 4 Ch. 616.
(4) 41 Ch. D. 326.
(5) 1 Mac. & G. 664.
(6) 34 Ch. D. 675.
(7) [1891] 2 Ch. 363.

C. A.
1892
In re
DOODY.
FISHER
v.
DOODY.
HIBBERT
v.
LLOYD.

trustee are dealt with, viz., that he cannot receive pay for his own trouble: *Matthison* v. *Clarke* (1); *In re Taylor* (2); *In re Roberts* (3); *In re Wallis* (4). This rule applies to all persons who have fiduciary duties to perform. For instance, in *Matthison* v. *Clarke* it was held that where a mortgagee with a power of sale was a member of a firm of auctioneers, his firm, who sold for him, were not entitled to commission. That, accordingly, is the principle which should be applied in the present case. It makes no difference whether the mortgagee-solicitor is acting for himself alone, or for himself and a co-mortgagee: *Field* v. *Hopkins* (5); *Christophers* v. *White* (6). *In re Donaldson* (7) is inconsistent with *In re Wallis*.

[STIRLING, J., referred to *Wyatt* v. *Cook* (8).]

Hastings, Q.C., and *Method*, for the Plaintiffs in *Hibbert* v. *Lloyd*:—

This is the case of a solicitor-mortgagee appearing in an action on behalf of himself and his co-mortgagee. Somebody must have appeared for them. The expenses have not been increased by the appearance of the solicitor-mortgagee instead of another solicitor; and the principle of *Cradock* v. *Piper* (9) applies. There it was decided that where a solicitor appears on behalf of himself and a co-trustee, and the expense has not been increased, he is entitled to the usual costs.

Challis, for the Rev. *J. F. Sulivan*, one of the Defendants in *Hibbert* v. *Lloyd*:—

Cases which relate to solicitor-trustees are of no authority to decide questions relating to solicitor-mortgagees. The two branches of the law rest upon different principles. In cases relating to trustees the *ratio decidendi* is, that a trustee must not be allowed to make a profit out of the trust, because he would then be under a perpetual temptation to administer the trust with a view to his own profit instead of the interest of his *cestui*

(1) 3 Drew. 3.
(2) 18 Beav. 165.
(3) 43 Ch. D. 52.
(4) 25 Q. B. D. 176.
(5) 44 Ch. D. 524.
(6) 10 Beav. 523.
(7) 27 Ch. D. 544.
(8) W. N. (1868) 237.
(9) 1 Mac. & G. 664.

que trust. In cases relating to mortgagees the *ratio decidendi* is, that a mortgagee can claim an allowance only upon the ground that he has paid the money; and, therefore, if he has not in fact paid the money, there is no ground upon which he can claim it. In *Sclater* v. *Cottam* (1) it is expressly stated that the solicitor, whose costs were disallowed, appeared also on behalf of his co-mortgagee. The same thing is stated in *In re Taylor* (2), which case must have been decided upon the same principle. *In re Donaldson* (3) cannot be regarded as having any weight. The case is treated throughout as though it depended upon the fact that the mortgage-money was trust money; a fact that was quite irrelevant to the question at issue.

Birrell, for Mrs. *Thomasin,* another Defendant in *Hibbert* v. *Lloyd.*

Hastings, in reply, in both actions, referred to *National Provincial Bank of England* v. *Games* (4), and *Clack* v. *Carlon* (5).

1892. Aug. 9. STIRLING, J.:—

These are summonses raising some questions of practical importance as to the taxation of costs of mortgagees where one of them happens to be a solicitor. The circumstances which give rise to the dispute are of common occurrence, and one would have expected to find the law well settled, but no authority has been found which precisely governs the cases which I have now to decide. [His Lordship then stated the facts in both actions, and continued:—]

In argument much reference was made to the analogies presented by the case of solicitor trustees, and as this branch of the law has been more frequently the subject of reported decisions, it may be well to begin by considering how it stands.

The general principle is stated clearly by Lord *Cranworth* in *Broughton* v. *Broughton* (6). At p. 164 of the report he said: "The rule applicable to the subject has been treated at the Bar as if it were sufficiently enunciated by saying, that a trustee

(1) 3 Jur. (N.S.) 630.
(2) 18 Beav. 165.
(3) 27 Ch. D. 544.
(4) 31 Ch. D. 582.
(5) 7 Jur. (N.S.) 441.
(6) 5 D. M. & G. 160.

C. A. 1892 *In re* DOODY. FISHER *v.* DOODY. HIBBERT *v.* LLOYD. Stirling, J.

shall not be able to make a profit of his trust, but that is not stating it so widely as it ought to be stated. The rule really is, that no one who has a duty to perform shall place himself in a situation to have his interests conflicting with that duty; and a case for the application of the rule is that of a trustee himself doing acts which he might employ others to perform, and taking payment in some way for doing them. As the trustee might make the payment to others, this Court says he shall not make it to himself; and it says the same in the case of agents, where they may employ others under them. The good sense of the rule is obvious, because it is one of the duties of a trustee to take care that no improper charges are made by persons employed for the estate. It has been often argued that a sufficient check is afforded by the power of taxing the charges, but the answer to this is that that check is not enough, and the creator of the trust has a right to have that, and also the check of the trustee. The result therefore is, that no person in whom fiduciary duties are vested shall make a profit of them by employing himself, because in doing this he cannot perform one part of his trust, namely, that of seeing that no improper charges are made. The general rule applies to a solicitor acting as a trustee, and the only question is, how far the circumstances of the present case take it out of this rule."

It therefore follows that, as a general rule, neither a solicitor trustee nor a firm of which the trustee is a member can receive out of the trust estate profit costs by way of remuneration for transacting legal business in connection with the trust.

To this general rule there are some exceptions, to one of which I may refer at once. It was decided by Lord *Hatherley*, when Vice-Chancellor, in *Clack* v. *Carlon* (1), that a solicitor trustee may employ his partner to act as solicitor for himself and his co-trustees with reference to the trust affairs, and may pay him the usual charges, provided that it has been expressly agreed between himself and his partner that he himself shall not participate in the profits or derive any benefit from the charges. Nothing short of this will be sufficient. In particular it was decided in *Christophers* v. *White* (2), that the general rule applies,

(1) 7 Jur. (N.S.) 441; 30 L. J. (Ch.) 639. (2) 10 Beav. 523.

C. A. 1892 In re DOODY. FISHER v. DOODY. HIBBERT v. LLOYD. Stirling, J.

although all the business has been transacted by the partners of the solicitor trustee, and not by the trustee himself.

Now, it has been expressly decided, that, under some circumstances and to some extent, solicitor mortgagees are subject to the same rules as solicitor trustees. In the case of *Matthison* v. *Clarke* (1), decided in 1854 by Vice-Chancellor *Kindersley*, the head-note is this: "A mortgagee with power of sale, was a member of a firm of auctioneers. The firm sold for him. Held, they were not entitled to their commission." And the Vice-Chancellor said (2): "It is a well-established rule in Equity, that a trustee cannot, as against his *cestui que trust*, make any profit out of the execution of the trusts in respect of the application of his personal trouble." The same principle appears to have been acted on by Lord *Romilly* in the case of *In re Taylor* (3), to which I shall refer hereafter.

It is plain, however, that the Vice-Chancellor did not consider that the law as to solicitor trustees is always applicable to solicitor mortgagees; for he says, "a mortgagee, in his mere character of mortgagee, is not a trustee;" and it is next to be inquired what is the rule which governs that case. It is to be found in the judgment of the same Vice-Chancellor in *Selater* v. *Cottam* (4), where he says: "One principle is, that the mortgagee is entitled, as between him and the mortgagor, to have taken into account, on a suit to redeem him, any costs which he has incurred in protecting his title to the mortgaged property. Another principle is, that the mortgagee, though he may be entitled to certain expenses properly incurred in relation to the mortgaged property, as the expenses of employing a collector, cannot himself charge for his own trouble." A little further on he says: "It is not the same as the case of a trustee being allowed his costs; but upon the two principles put together I think he is entitled to what he has disbursed, but not to that which is the remuneration for his own personal trouble." It was therefore held that a solicitor mortgagee who had defended the title to the mortgaged property in two actions, in one of which he acted as solicitor for himself and co-mortgagee, and in the other for himself alone, was entitled to

(1) 3 Drew. 3.
(2) Ibid. 4.
(3) 18 Beav. 165.
(4) 3 Jur. (N.S.) 630; 5 W. R. 744.

C. A. 1892 *In re* DOODY. FISHER *v.* DOODY. HIBBERT *v.* LLOYD. Stirling, J.

costs out-of-pocket only. In *In re Roberts* (1), it was held by Lord Justice *Kay*, on the like principle, that a solicitor cannot charge his client with profit costs for the preparation of a mortgage from the client to himself. These decisions, and the principle on which they are based, were approved and applied by the Court of Appeal in *In re Wallis* (2).

The costs relating to a transfer of a mortgage appear to me to fall, not within the decision in *Matthison* v. *Clarke* (3), but within that in *In re Roberts*; and if Mr. *Fisher* had been sole mortgagee and had had no partner, an application by him similar to that in the first of the cases before me, so far as it relates to the costs of the transfer, must have been held to be concluded against the applicants on authority. It is, however, contended that a distinction ought to be made: first, because he is only one of two mortgagees; and, secondly, because he has a partner. As regards the first distinction, I think that both on principle and on authority it cannot prevail. The principle is that a solicitor mortgagee is not to receive remuneration for his own trouble, and it appears to me that it can make no difference in the application of that principle whether the trouble is taken by the solicitor on his own behalf solely, or on behalf of himself jointly with some one else. Moreover, the point is covered by the decision in *Sclater* v. *Cottam* (4), for there the Vice-Chancellor disallowed the profit costs of the solicitor in an action in which he appeared for a co-mortgagee as well as for himself. The second ground of distinction gives rise to greater difficulty. The rule, it is said, being simply that the solicitor mortgagee is not entitled to remuneration for his own trouble, what is there to prevent his partner from receiving remuneration for his trouble? In my opinion, the rule does not prevent the partner from receiving remuneration, but the question immediately arises, what is the partner's remuneration to be? If the partners enter into an agreement that the mortgagee solicitor is not to share in the profits arising from the transaction, I should feel free to hold that the usual costs were to be allowed in full: in the absence of such an agreement it does not seem clear that this ought to be done.

(1) 43 Ch. D. 52.
(2) 25 Q. B. D. 176, 180.
(3) 3 Drew. 3.
(4) 3 Jur. (N.S.) 630; 5 W. R. 744.

To make the point more simple, I shall consider a case into which the element of partnership does not enter. Assume that a mortgagee solicitor employs another solicitor, with whom he is not in partnership, to transact the legal business connected with the mortgage, and that there is between them an agreement, such as actually existed in *In re Taylor* (1), that the work shall be done on agency terms—that is to say, that the profit costs are to be shared in defined proportions between the two solicitors. Can the mortgagee solicitor retain his share of the profit costs against the mortgagor? I think not. The rule is that the mortgagee solicitor is not to be remunerated for his own trouble; *a fortiori*, he cannot be allowed remuneration for the trouble of some one else. This was the decision of Lord *Romilly* in *In re Taylor*; but it is right to say that the costs in that case related to sales by the mortgagee under a power of sale, and consequently they fell within the decision of Vice-Chancellor *Kindersley* in *Matthison* v. *Clarke* (2).

Now, if on taking the partnership accounts between Mr. *Fisher* and Mr. *Hodges*, it turned out that a share of the profit costs was allowed to Mr. *Fisher*, and that he had actually got the benefit of that share in account, it would seem to me that he could not retain that benefit against the mortgagor. On the other hand, if the account shewed that the solicitor mortgagee was indebted to his co-partner, the latter ought not to be deprived of so much of the costs as was required to be applied in satisfaction of the debt.

To make the taxation depend on the result of the taking of a partnership account would, as it seems to me, simply be to introduce a rule unworkable in practice and to push abstract principle to a point at which it ceases to give results consistent with justice. Two alternatives only appear to me open, either to allow the whole of the costs just as if an independent solicitor had been employed or else to allow the partner the same share of the profit costs in the specific matter as he is entitled to in the general profits of the partnership business. If the former course is adopted, the mortgagor may be charged with a greater amount of costs than he ought to bear; if the latter, there is some danger of giving

(1) 18 Beav. 165. (2) 3 Drew. 3.

C. A. 1892 *In re* DOODY. FISHER *v.* DOODY. HIBBERT *v.* LLOYD. Stirling, J.

the mortgagee's partner less than his due. On the whole, I come to the conclusion that the latter alternative gives a nearer approximation to what would be required by a strict regard to principle, and is therefore preferable; and I do so the more readily that I find upon inquiry that, although there is no established practice on the subject in the Taxing Master's office, this view has actually been taken and acted upon there.

It was contended that the point had been decided the other way in *In re Donaldson* (1), and a close examination of the report does appear to shew that Mr. *Donaldson*, the mortgagee solicitor in that case, was a member of a firm of *Brown* and *Donaldson*. There is no allusion, however, to this fact in the argument or the judgment, and some, at least, of the observations in the judgment, as well as the decision itself, seem difficult to reconcile with the principles laid down by the Court of Appeal in the subsequent case of *In re Wallis* (2), by which I am bound. Under these circumstances, I cannot regard the decision in *In re Donaldson* as governing the case of *In re Doody*.

I now return to the consideration of the rules which govern the rights of solicitor trustees. An exception to the general rule already stated was established by the case of *Cradock* v. *Piper* (3), decided in 1850 by Lord *Cottenham*. It is to this effect, that where a solicitor (or his firm) appears in a suit or action on behalf of himself and a co-trustee, and the expense has not thereby been increased, then the solicitor (or his firm, as the case may be), is entitled to the usual costs.

The summons in *Hibbert* v. *Lloyd* raises the question, whether a similar exception exists in the case of solicitor mortgagees. The ground of Lord *Cottenham's* decision appears at pp. 679–80 of the report. [His Lordship read those pages in the report of *Cradock* v. *Piper*, and continued:—]

The rule has been adversely criticized on more than one occasion—as, for example, by Lord *Cranworth*, in *Broughton* v. *Broughton* (4), but it has been acted upon ever since. It was recently considered by the Court of Appeal in *In re Corsellis* (5).

(1) 27 Ch. D. 544.
(2) 25 Q. B. D. 176.
(3) 1 Mac. & G. 664.
(4) 5 D. M. & G. 160.
(5) 34 Ch. D. 675.

In that case Lord Justice *Lindley* said (1): "I am not one of those who admire the decision in *Cradock* v. *Piper* (2). It is one of those cases which are anomalous, but which have laid down a certain rule, and that rule has been acted upon by everybody whom it concerns for so long a time that we cannot and ought not to vary it. It was a rule laid down by Lord *Cottenham* when Lord Chancellor in 1850, and it has been acted on ever since by the Taxing Masters, and therefore we must accept it; but we must accept it as an anomalous rule applicable to the case to which it applies, and which ought not to be extended. But although we ought not to extend the rule, it will not do to fritter it away." And Lord Justice *Lopes* expressed himself to the same effect. With these opinions, if I may be allowed to say so, I desire respectfully to express my concurrence.

I have thought it right to inquire whether the rule established in *Cradock* v. *Piper* had been applied to solicitor mortgagees by the Taxing Masters, and have received the following certificate from the senior master, Mr. *Buckley*: "In answer to your Lordship's question, I beg to certify that, according to the practice of this office, the principle of *Cradock* v. *Piper* is not applicable to the costs of a solicitor mortgagee acting for himself and his co-mortgagees. This practice is founded on the case of *Sclater* v. *Cottam* (3), which decides that under such circumstances the solicitor is entitled to costs out of pocket only—and this is confirmed by the recent cases of *Stone* v. *Lickorish* (4), and *In re Wallis* (5)."

Now, the decision of *Sclater* v. *Cottam* is in point, although it does not appear that *Cradock* v. *Piper* was called to the Vice-Chancellor's attention. Seeing, however, that that decision was given in 1857, and has been acted on uniformly by the Taxing Masters, and that the rule established by *Cradock* v. *Piper* is an anomaly, and is not to be extended, I think that it ought not to be applied in the case of solicitor mortgagees. The result is that, in *In re Doody, Fisher* v. *Doody* the summons will be allowed as regards both classes of items which I have mentioned, and the

(1) 34 Ch. D. 687.
(2) 1 Mac. & G. 664.
(3) 3 Jur. (N.S.) 630.
(4) [1891] 2 Ch. 363.
(5) 25 Q. B. D. 176.

C. A.
1892
In re DOODY.
FISHER v. DOODY.
HIBBERT v. LLOYD.
Stirling, J.

matter will be remitted to the Taxing Master for re-consideration; and, of course, he will not be precluded from considering whether, as regards the items relating to the sale of the mortgaged property, the decision of *Kindersley*, V.C., in *Matthison* v. *Clarke* (1) is or is not applicable. Subject to that, there will be a direction that he is to ascertain the amount which would have been properly chargeable against the mortgagor if an independent solicitor had been employed, and to allow the same proportion of that amount as Mr. *Hodges* is entitled to in respect of the general profits of the partnership between himself and Mr. *Fisher*. The costs of both parties of the summons will be costs in the action.

In *Hibbert* v. *Lloyd* the summons will be dismissed without costs.

W. W. K.

C. A.

The Plaintiffs in *Hibbert* v. *Lloyd* appealed. The appeal was heard on the 16th of November, 1892.

Hastings, Q.C., and *Method*, for the appeal:—

As *Hibbert* employed *Bolton* as his solicitor he must be answerable to him for a share of the costs, and if he cannot get it over he must pay it himself. But *Hibbert* and *Bolton* are trustees of the mortgage money, and *Cradock* v. *Piper* (2) settles that they could clearly get the costs beyond expenses out of pocket out of the trust estate, so the effect of the decision appealed from is to throw the profit costs on the *cestuis que trust* instead of on the mortgagor. The certificate furnished to Mr. Justice *Stirling* from the Taxing Master's office can hardly be correct, for an earlier bill of costs which we brought in was taxed in full in the presence of the opposing parties. We rely on *Cradock* v. *Piper*, which cannot in principle be distinguished from the present case. *Sclater* v. *Cottam* (3) is against us, but *Cradock* v. *Piper* was not cited. *In re Donaldson* (4) raises the precise point, and is in our favour, and shews that the certificate given in the present case does not correctly represent the practice. Some of the observations in the judgment may go too far, but still it is an authority.

(1) 3 Drew. 3.
(2) 1 Mac. & G. 664.
(3) 3 Jur. (N.S.) 630; 5 W. R. 744.
(4) 27 Ch. D. 544.

Challis and *Birrell*, for the Defendants, were not called upon.

C. A. 1892 *In re* DOODY. FISHER *v.* DOODY. HIBBERT *v.* LLOYD.

LINDLEY, L.J.:—

This case raises a question of some importance. A foreclosure decree was made in an action brought by two mortgagees, one of whom, being a solicitor, acted as such in the action for himself and his co-mortgagee. It is conceded that he is entitled to costs out of pocket, but he asks also for his profit costs. Is he right in that? I will begin by taking the simplest case, that of a solicitor being sole mortgagee and acting as solicitor on his own behalf. What costs can he get? Only costs out of pocket, not because he is a trustee, but because the bargain is that the mortgagor may redeem on payment of principal, interest, and costs, *i.e.*, costs incurred by the mortgagee, which do not include remuneration for his own personal trouble. We arrive then in that case at the same result and rule as in the case of a trustee. Then comes a more complicated question, Does the rule apply where the solicitor acts not only for himself but also for his co-mortgagee? Unless the rule applies, one of the mortgagees will be charging against the mortgagor a remuneration for his own personal trouble, and this ought not to be allowed. There is no authority in favour of the Appellants except *In re Donaldson* (1), and there is a long course of practice against them. I do not think that the practice has been so universal as I had supposed, but no doubt in many cases the point escaped attention. When, however, attention was called to it, as in *Sclater* v. *Cottam* (2), the rule was recognised. *In re Wallis* (3) shews that the principle is settled that a mortgagee cannot charge a mortgagor for his own personal services about the security. As to *In re Donaldson*, it goes a great deal too far, and is inconsistent with the decisions in *Sclater* v. *Cottam* and *In re Wallis*. As to *Cradock* v. *Piper* (4), Lord *Cottenham* decided that where two trustees were parties to a litigation, and one of them, being a solicitor, acted for both, he was entitled to full costs. But when we look at the judgment we find that his Lordship does not meet the difficulty arising from the double position of trustee

(1) 27 Ch. D. 544.
(2) 3 Jur. (N.S.) 630; 5 W. R. 744.
(3) 25 Q. B. D. 176.
(4) 1 Mac. & G. 664.

C. A. 1892 *In re* DOODY. FISHER *v.* DOODY. HIBBERT *v.* LLOYD.

and solicitor. The Courts have repeatedly expressed doubts of the soundness of that decision. It came before us in *In re Corsellis* (1)—we did not overrule it, but we shewed that we did not approve of it. It stands, but it does not cover the present case. If we thought it sound in principle we ought to extend it to cases which, although different, fall within its principle; but the better opinion being that the decision is unsound it ought not to be extended to any case not coming clearly within it.

BOWEN, L.J.:—

I agree. I cannot follow the reasoning in *Cradock* v. *Piper* (2), and do not think that it ought to be extended.

A. L. SMITH, L.J.:—

It was decided in *In re Wallis* (3), if it had never been decided before, that a solicitor who is sole mortgagee cannot get profit costs. Why then should he get profit costs if a layman is joined with him? *Hibbert*, who is joined with him, is not liable to him for any part of the costs, so the hardship suggested by the Appellants does not arise. *Cradock* v. *Piper*, being a case of trustees, does not govern the present case, and I agree that it ought not to be extended.

Solicitors in *In re Doody, Fisher* v. *Doody*: *Cope & Co.*, agents for *Fisher & Hodges, Newport, Shropshire; Sharpe, Parker, Pritchard & Sharpe*, agents for *Cave & Laycock, Altrincham.*

Solicitors in *Hibbert* v. *Lloyd*: *Bolton & Co.; Cheston & Sons.*

(1) 34 Ch. D. 675. (2) 1 Mac. & G. 664.
(3) 25 Q. B. D. 176.

H. C. J.

In re McGRATH (Infants).

C. A. 1892 Oct. 31; Nov. 1, 11.

[1891 M. 3494.]

Infant — Guardian — Removal by Court — Religious Education — Welfare of Infant — Guardianship of Infants Act, 1886 (49 & 50 *Vict. c.* 27), *ss.* 2, 3, 6, 13.

The Court has jurisdiction to remove a guardian of infants appointed by their mother after the father's death, under the power conferred on her by the *Guardianship of Infants Act*, 1886, if it is satisfied that it is for the benefit of the infants so to do.

The jurisdiction of the Court in relation to infants extends to infants who are not wards of Court, and who have no property; but such jurisdiction is limited to the appointment and removal of guardians, and does not extend to making schemes for their maintenance or education.

A journeyman tailor, who was a Roman Catholic, in 1876 married a woman who was a Roman Catholic. There were five surviving children of the marriage, all of whom were baptized as Roman Catholics. At the date of the hearing of the appeal they were aged as follows: a boy aged sixteen, three girls aged respectively fifteen, thirteen, eleven, and a boy aged six. The father died in 1888, and was buried as a Roman Catholic; but during his life he expressed no wish as to the religion in which his children should be brought up, and appeared indifferent on the subject. During his life his children, with his knowledge, sometimes attended Roman Catholic and sometimes Protestant schools. The eldest boy, with his father's consent, was sent to an industrial home conducted on Protestant principles. He was now in domestic service, and professed himself a Protestant. The three girls were principally educated at Roman Catholic schools. After the father's death a benevolent lady, a member of the Church of *England*, gave the mother, who was in very poor circumstances, regular pecuniary assistance; and in November, 1889, the mother executed a deed under the *Guardianship of Infants Act*, 1886, by which she appointed this lady guardian of the three girls and the youngest boy. Before her death the mother professed herself a Protestant. The two younger girls were taken some time after their father's death from the Roman Catholic school at which they then were, and all three girls were placed by the lady at a Protestant industrial home; where they still remained. The younger boy lived with his mother's brother, who was a Roman Catholic, and attended first a board school and afterwards a National school.

In November, 1891, an aunt of the father, who was a Roman Catholic, acting as next friend of the four younger children, took out a summons asking that the guardian might be removed and the next friend and a Roman Catholic lady appointed joint guardians of the children:—

Held (affirming the decision of *North*, J.), that, having regard to all the

C. A.
1892
In re McGrath (Infants).

circumstances, it would not be for the welfare of the children that the guardian should be removed, and that no direction ought to be given as to the religious education of the children. The summons was accordingly dismissed.

THIS was an appeal from an order of Mr. Justice *North*, dismissing a summons taken out by *Margaret Macauliffe*, as next friend of four infants, under the *Guardianship of Infants Act*, 1886 and the *Custody of Children Act*, 1891, asking that the present guardian, Mrs. *Hannah Scrimgeour*, might be removed, and that a Mrs. *Bagshawe* and the next friend might be appointed guardians in her place, or, in the alternative, that they might be appointed to act jointly with Mrs. *Scrimgeour*, upon her undertaking to bring up the infants in the religion of their deceased father (1).

The facts are fully set forth in the previous report, and the following short statement will be sufficient for the purposes of the present report.

Both the parents of the infants were dead, and were both originally Roman Catholics. The father was a journeyman tailor. They had five children: a son, who was born a few weeks after the marriage, and the four children who were the subject of the present application, namely, *Mary Margaret*, born in February, 1877; *Elizabeth*, born in August, 1879; *Catherine*, born in June, 1881, and *Thomas Michael*, born in 1886. All the children were baptized as Roman Catholics. The eldest boy was brought up in a Church of *England* school, and was now in domestic service. He made an affidavit saying that he was a Protestant, and intended to continue in that religion.

The father died in June, 1888; he was attended by a Roman Catholic priest on his death-bed and was buried as a Roman Catholic. During his life he appeared to be indifferent to religion, and did not interfere with the religious education of his children, nor did he express any wish as to the religion in which they should be brought up, or appoint any guardian for them. After his death, the family being in very needy circumstances, they were relieved by Mrs. *Scrimgeour*, who was a Protestant, and she obtained work for the mother and assisted the family with

(1) [1892] 2 Ch. 496.

pecuniary relief until the death of the mother, which happened in July, 1891. On the 1st of November, 1889, the mother executed a deed under the provisions of the *Guardianship of Infants Act*, 1886, appointing Mrs. *Scrimgeour* guardian of the four younger children after her death. The eldest girl had been educated partly at Roman Catholic and partly at Protestant schools; the two younger girls had been educated at a Roman Catholic school, though they sometimes went to a Protestant Sunday school, and were, at the time of their father's death, at *Nazareth House*, a Roman Catholic institution. After their father's death, the two younger girls were removed from *Nazareth House*, and they and their elder sister were sent by Mrs. *Scrimgeour* to a Protestant home at *Stockwell*, where they are still residing. The younger boy was living with his uncle and aunt, Mr. and Mrs. *Dwyer*, who were Roman Catholics, and Mrs. *Scrimgeour* paid them for his maintenance. He attended at first, a board school, and latterly, a National school. No charge of misconduct of any kind was made against Mrs. *Scrimgeour*. Under these circumstances, *North*, J., dismissed the summons, being of opinion that it was not for the welfare of the children that the guardian should be removed, and refused to give any direction as to the religious education of the children.

The next friend appealed from this decision.

Rigby, S.G., *S. Hall*, Q.C., and *P. Stokes*, for the Appellant, cited *In re Newbery* (1), *Hawksworth* v. *Hawksworth* (2), and *In re Scanlan* (3).

Cozens-Hardy, Q.C., and *Micklem*, for the guardian, referred to *In re Clarke* (4), *In re Nevin* (5), and *Stourton* v. *Stourton* (6).

Rigby, in reply.

1892. Nov. 11. Lindley, L.J., delivered the judgment of the Court (*Lindley*, *Bowen*, and *A. L. Smith*, L.JJ.) as follows:—

This is an appeal from the refusal of Mr. Justice *North* to

(1) Law Rep. 1 Ch. 263.
(2) Ibid. 6 Ch. 539.
(3) 40 Ch. D. 200.
(4) 21 Ch. D. 817.
(5) [1891] 2 Ch. 299.
(6) 8 D. M. & G. 760.

C. A. 1892 *In re* McGrath (Infants).

interfere with the custody or education of three girls and a boy, all of whom are infants, aged respectively fifteen, thirteen, eleven and six.

Their father and mother were poor people; they were both Roman Catholics, and they are both dead. The mother survived, and by a deed executed by her in November, 1889, she appointed a Protestant lady of means guardian of the children in question. This lady has had the care of them since April, 1890; she supports them out of her own resources, and has brought them up in the Protestant and not in the Roman Catholic religion. An aunt of the father, who is a Roman Catholic and in poor circumstances, thinks this ought not to be. A kind and benevolent Roman Catholic lady is willing to take care of the children and to bring them up in the Roman Catholic religion if they are entrusted to her. In order to have the children transferred to her care, or at all events to insure their education in the Roman Catholic religion, a summons was taken out in the name of the infants by their next friend, asking for the removal of their guardian and for the appointment of the Roman Catholic lady and the next friend as their guardians, or, in the alternative, that these ladies might be appointed co-guardians with the present guardian upon the lady undertaking to bring the children up as Roman Catholics. Mr. Justice *North* refused to interfere, and the infants by their next friend have appealed from his decision.

Before proceeding further it is desirable to state the legal rights of the parties to this unfortunate litigation. The eldest girl is fifteen. She does not desire to become a Roman Catholic. She soon will be able to earn her own living, and the Appellant's counsel saw that it was hopeless to try and induce the Court to interfere with her. The three youngest children have no property of their own, and their only right is to be supported and educated by the proper poor law authorities if no one else will provide for them. Their rights as regards their religious education will appear presently when the duty of their guardian and of the Court towards them is examined. The lady who is their duly appointed guardian has the right to their custody and the right to support and educate them, in what particular religion will be considered hereafter. The other parties to this litigation

have themselves no right to remove them from the custody of their legal guardian; no right to dictate to that guardian how she shall clothe them, nor how she shall feed them, nor what she shall have them taught. Their right in this matter is precisely the same as the right of the rest of Her Majesty's subjects, and is limited to informing the Court, at their own risk as to costs, of misconduct on the part of the legal guardian towards her wards.

There was at one time an attempt to throw some doubt upon the jurisdiction of the Court of Chancery over the guardians of children who had no property; but all doubt on this point was set at rest by Lord *Cottenham's* decision in *In re Spence* (1), and it is clear that the old Court of Chancery had, and that the High Court has, jurisdiction to interfere with and to remove a guardian of a child who has no property on proof of misconduct on the part of the guardian towards the child, or upon proof that it is for the welfare of the child that the guardian should be removed. But it is obvious that the jurisdiction of the Court is very limited in such a case. The child having no property under the control of the Court, the Court cannot provide any scheme for the child's maintenance or education. All that the Court can do is to remove the guardian and appoint another, if another can be found, to take care of the child. This limited jurisdiction being however established, it follows that the exercise of such jurisdiction can be invoked on behalf of any child by any one who is willing to come forward on its behalf and to act as its next friend. The jurisdiction of the Court over guardians of children without property was exercised in *In re Scanlan* (2), and was recognised by Mr. Justice *North* in his judgment in this case and is not open to controversy. But it cannot be too generally known that no next friend, no relation, no kind or charitable person, no co-religionist of the child, no priest or minister of any religion has in the case now supposed any right whatever beyond the right of informing the Court of what is wrong, and asking the Court's assistance on behalf of the infant.

The next point to consider is the duty of the Court towards a penniless child under the care of a legal guardian who is able and willing to maintain and educate the child at his own expense.

(1) 2 Ph. 247. (2) 40 Ch. D. 200.

C. A. 1892 *In re* McGrath (Infants).

The duty of the Court is, in our judgment, to leave the child alone, unless the Court is satisfied that it is for the welfare of the child that some other course should be taken. The dominant matter for the consideration of the Court is the welfare of the child. But the welfare of a child is not to be measured by money only, nor by physical comfort only. The word welfare must be taken in its widest sense. The moral and religious welfare of the child must be considered as well as its physical well-being. Nor can the ties of affection be disregarded.

As regards religious education it is settled law that the wishes of the father must be regarded by the Court and must be enforced unless there is some strong reason for disregarding them. The *Guardianship of Infants Act*, 1886, which has so greatly enlarged the rights of mothers after their husbands' deaths, has not changed the law in this respect. This was decided by Mr. Justice *Stirling* in *In re Scanlan* (1), and is unquestionable. The consequence is that, notwithstanding that Act, a widow may still find herself compelled to bring up her child in a religion which she abhors.

The wishes of the father if not clearly expressed by him must be inferred from his conduct. If the father is dead it will be naturally inferred that in the absence of evidence to the contrary his wish was that the children should be brought up in his own religion; that is, the religion which he professed. This inference is one which the Court in the absence of evidence to the contrary is bound to draw, and is practically not distinguishable from a rule of law to the effect that an infant child is to be brought up in its father's religion unless it can be shewn to be for the welfare of the child that this rule should be departed from, or the father has otherwise directed.

This we believe to be the true state of the law. The law is not so rigid as to compel the Court to order children to be brought up in the religion of their deceased father, regardless of the consequences to themselves. This point was carefully considered by the present Lord Justice *Kay* in *In re Clarke* (2), and more recently by this Court in *In re Nevin* (3). *Hawksworth* v. *Hawksworth* (4), in which the duty of a guardian to bring up a

(1) 40 Ch. D. 200.
(2) 21 Ch. D. 817.
(3) [1891] 2 Ch. 299.
(4) Law Rep. 6 Ch. 542.

child in its father's religion, and the duty of the Court to order this to be done, was most emphatically asserted, does not warrant the contention that there are no exceptions to this general rule; and the Court will always depart from the rule for sufficient reason. The welfare of the infant is the ultimate guide of the Court: see *Stourton* v. *Stourton* (1), *Andrews* v. *Salt* (2), and *In re Agar Ellis* (3). The right of the infant in this respect is the co-relative of the duty of its guardian and of the Court.

We proceed now to inquire why the Court should interfere in this particular case? The question may be put in another form, viz., Is it for the welfare of the three youngest children that the Court should take steps to have them now brought up in the Roman Catholic religion rather than in the Protestant religion in which they are being brought up by their legal guardian? Or again, the question may be put in this shape, viz., Is it the duty of the Court to remove the present guardian unless she will undertake to bring these three children up in the Roman Catholic religion? She is willing to give this undertaking rather than be removed.

As regards the physical comfort, and unsectarian education of the children, there is no ground whatever for the interference of the Court. The whole question turns on their religious education. Does their welfare demand that this should be now changed? This Court, judicially administering the law, cannot hold one religion to be better than another. The law does not impose upon the Court the duty of doing more than to order a child to be brought up in its father's religion, unless there are sufficient reasons for doing otherwise.

Let us first inquire into the religious views of the father. It is plain from the evidence that he was not a religious man. He did not attend any place of worship himself. His children were baptized as Roman Catholics; but in his lifetime his eldest son was educated with his consent by Protestants. The girls attended a Roman Catholic day school, but on Sundays they frequently went to a Protestant chapel and to a Protestant Sunday school. The youngest boy was at home. If any kind

(1) 8 D. M. & G. 760. (2) Law Rep. 8 Ch. 622.
(3) 10 Ch. D. 49; 24 Ch. D. 317.

C. A. 1892 *In re* McGrath (Infants).

and charitable person had in the father's lifetime offered to maintain his four youngest children and bring them up as Protestants, we are convinced that he would gladly have assented to the arrangement. In this respect the case differs widely from *Hawksworth* v. *Hawksworth* (1), where Lord Justice *James* said "There is not the slightest trace of any indifference on the part of the father to the religious education of his child. There is nothing to shew that he would have acquiesced in the child being brought up a Protestant if he had been living." Under the circumstances of this case, to rely on the wishes or supposed wishes of the father as a ground for bringing some of his children up in the Roman Catholic religion rather than in any other is to rely on a rotten reed. Still it does not follow that his religion is to be disregarded. Let us then look at the present state of affairs. The father died in June, 1888, a Roman Catholic, and was buried as such. At his death the eldest girl was at a board school, but he was ill, and probably did not know it. The two other girls were at *Nazareth House*, which is a Roman Catholic school. After the father's death the eldest girl appears to have been sent to a Roman Catholic school on week days and to a Protestant Sunday school; her two sisters remained at *Nazareth House* until April, 1890, when they came home to see their mother who was very ill. Since that time all the girls and the youngest boy have been brought up as Protestants by their guardian duly appointed by their mother in November, 1889. The girls have been brought up and educated at an institution which has become to them a home, and which is maintained by the lady who befriended their mother until she died, that is, until July, 1891. The eldest girl, who is now fifteen, wishes to remain where she is, and it is not the duty of the Court to interfere with her. Under these circumstances, is it for the benefit of the three youngest children, two girls and a boy, that their religious education should be again changed? Is it for their welfare that they should be brought up in a different religion from their eldest brother and eldest sister? Would such a change be in accordance with their father's wishes? Our answer to all these questions is, No. Their mother's wishes are not relevant;

(1) Law Rep. 6 Ch. 542.

although it is very painful so to hold. They were however clearly expressed in her lifetime in favour of the present Protestant guardian. Is the Court then driven by any rule of law to play battledore and shuttlecock with these children and with their religious education? Is the Court bound to hold, contrary to its own inferences from the facts of the case, that it is for the welfare of these children that they shall be taken from the care of the lady to whom they were entrusted by their mother, and by whom they have been and are all most kindly treated? Our answer again is, No. Our answer would be precisely the same if the father had been a Protestant and the guardian a Roman Catholic, who was bringing up the children as Roman Catholics. With a father like the late Mr. *McGrath*, and with like indifference shewn by him, it would be for the true welfare of the children to leave them alone.

We entirely concur in the observations of Lord Justice *Mellish* in *Hawksworth* v. *Hawksworth* (1) where he says, "I fear that we should be doing much mischief if we were to hold out encouragement to persons to think that if they get hold of a child of tender years they may, by educating it for a longer or shorter period of time in their own religion, secure that the child shall be educated in that religion instead of the religion of the father." But where, as here, the father is proved to have been indifferent whether his children were brought up Protestants or Roman Catholics, and where two of his children are of one of those religions already, and the others are being brought up in the same religion, it is not for their welfare that they should be educated in the other religion. This very case illustrates the mischief which may arise if near relations differ in their religious views. This unfortunate litigation is due to the fact that the father's aunt thinks it her duty to see that his children shall be brought up in the religion in which she thinks he ought to have brought them up, although he was indifferent about the matter. Such litigation ought clearly to be discouraged.

We refrain from going minutely into the evidence; but the whole of it has been read and carefully considered. The report of the case in the Court below contains a full and accurate statement

(1) Law Rep. 6 Ch. 545.

C. A. 1892 *In re* McGrath (Infants).

of the facts with one exception, which we have corrected. The two youngest girls were at *Nazareth House* after their father's death, longer than Mr. Justice *North* thought they had been. But notwithstanding this we are of opinion that his judgment is correct, and that this appeal should be dismissed with costs.

Solicitors: *Leathley & Willes; A. E. Pridham.*

M. W.

CHITTY, J.
1892
Nov. 9, 10.

In re DE TEISSIER'S SETTLED ESTATES.

[1892 D. 886.]

In re DE TEISSIER'S TRUSTS. DE TEISSIER *v.* DE TEISSIER.

[1892 D. 885.]

Application of "Capital Money" — Improvements—Mansion-house—Alterations with a view to Letting — "Rebuilding" — "Rental" of Settled Land—Settled Land Act, 1882 (45 & 46 *Vict. c.* 38), *s.* 22 *sub-s.* 5; *s.* 25—*Settled Land Act*, 1890 (53 & 54 *Vict. c.* 69), *s.* 13 *sub-ss. ii., iv.*; *s.* 15—*Repairs—Dry-rot—Salvage—Tenant for Life—Infant Remainderman — Expenditure of Trust Money—Jurisdiction.*

There must be a present intention to let, if not an immediate prospect of letting, before the expenditure of any capital money will be authorized in "additions to or alterations in buildings," under sect. 13, sub-sect. ii., of the *Settled Land Act*, 1890. The "rebuilding" mentioned in sect. 13, sub-sect. iv., will not include structural repairs, however extensive, and in calculating the "annual rental" of the settled land, for the purposes of the proviso at the end of sect. 13, sub-sect. iv., income derived from capital money invested should be included.

A testator devised his real estate to the use of three persons successively for life, without impeachment of waste, with remainders over. The last tenant for life was an infant. He also bequeathed his residuary personal estate to trustees, upon trusts corresponding with the limitations of his real estate. At the testator's death the mansion-house was very dilapidated; structural alterations and repairs were alleged to be absolutely necessary to make the house habitable for the present tenant for life, who proposed to occupy it. The trustees, with the consent of all the tenants for life, applied for leave to expend part of the residuary personal estate in carrying out repairs, necessary for the preservation of the house, on the ground that it would be for the benefit of all persons interested in the estate:—

Held, that there was no jurisdiction to charge the interest of the infant tenant for life in remainder with the expenditure proposed.

In re Jackson (1) and *Conway* v. *Fenton* (2) distinguished:

Held, also, that whether the *Settled Land Acts* did or did not exclude or fetter the general jurisdiction of the Court—as to which no opinion was expressed—they were of great assistance in guiding the Court to a proper conclusion as to what repairs and improvements should be allowed.

(1) 21 Ch. D. 786. (2) 40 Ch. D. 512.

CHITTY, J.

1892

In re DE TEISSIER'S SETTLED ESTATES.

In re DE TEISSIER'S TRUSTS.

DE TEISSIER *v.* DE TEISSIER.

Admittedly the proposed expenditure was not, in this case, within the *Settled Land Acts*; consequently, on this ground also, the application ought to be refused.

Hibbert v. *Cooke* (1) discussed and followed.

THESE were two applications for the purpose of authorizing the expenditure of trust money in rebuilding, repairs, and improvements; the first was by a tenant for life under the *Settled Land Acts*, and the second by trustees under the general jurisdiction of the Court; but the facts and circumstances, under which the application was made in each case, were the same, and may be shortly stated, for the purposes of this report, as follows:—

The Rev. the Baron *Philip Antoine de Teissier*, who died in April, 1891, by his will dated the 30th of September, 1884, devised his freehold estate, called the *Bourne House* estate, at *East Woodhay*, near *Newbury*, *Hants*, and all other his freehold hereditaments, to the use of his brother, General *Henry Price de Teissier*, and his assigns during his life, without impeachment of waste; with remainder to the use of his nephew, Captain *Henry de Teissier*, and his assigns during his life, without impeachment of waste; with remainder to his first son (an infant born in the testator's lifetime), and his assigns during his life, without impeachment of waste, with remainders over; and he declared that *Bourne House* was to be deemed the principal mansion-house. The testator also bequeathed his residuary personal estate upon trusts corresponding with the limitations of his real estate; and this residuary estate, amounting to about £48,500, had, by an order of the 12th of March, 1892, made in the matter of the same estate, *Lane* v. *De Teissier* [1891 D. 2090], been directed to be treated as held upon the same trusts as if it were capital money arising under the *Settled Land Act*, 1882.

The will contained a power of sale by the trustees, with the consent of the tenant for life for the time being, but contained no provisions as to repairs.

The testator's real estate consisted solely of the *Bourne House* estate, which contained some thirty and a half acres of land, on which stood the mansion-house known as *Bourne House*,

(1) 1 S. & S. 552.

three cottages, stables, and outbuildings: the estimated annual value of this was given as £130. The income derived from the investments of the residuary personal estate was £1459.

The mansion-house, cottages, and outbuildings were in a dilapidated condition at the time of the testator's death, and it appeared that the repairs, which were considered necessary by the present tenant for life and his architect and surveyor, consisted of a new roof, alterations of a structural nature, amounting in some cases to rebuilding, consequent upon the insecurity of the outside walls and dry-rot; an entire rearrangement of the drainage, which was deficient and unsanitary; an additional outhouse, with rooms over for servants, and the rebuilding of two out of the three cottages, and repairing the third. The house was stated to be uninhabitable according to modern ideas, though the testator had lived in it till his death.

The present tenant for life, who was also one of the trustees, contemplated occupying *Bourne House* with his family, if possible, and, after conferring with his co-trustees, had already expended, with their knowledge and approbation, a sum of £930 in repairs and necessary improvements, and it was proposed to spend a further sum of £900.

No scheme, pursuant to the *Settled Land Act*, 1882, s. 26, sub-s. 1, had been submitted by the tenant for life to his co-trustees, or to the Court, prior to the expenditure of part of the money: but it was alleged that all the trustees were well aware of the facts, that the proposed works were considered absolutely necessary, and that the tenant for life had given the requisite instructions to the architect and builders.

The tenant for life took out the first summons, under the *Settled Land Acts*, 1882 to 1890, making his co-trustees, and the next two tenants for life in remainder, Respondents; and by it he asked that the trustees might be authorized to expend the amount necessary for repairs and further improvements out of the capital money now invested in their names.

Upjohn, for the tenant for life:—

No scheme has been submitted to the trustees for approval before the improvements were begun; but this omission is now

CHITTY, J.
1892
In re
De Teissier's
Settled
Estates.
In re
De Teissier's
Trusts.
De Teissier
v.
De Teissier.

provided for by the *Settled Land Act*, 1890, s. 15. There is a question as to whether income of capital money invested is to be included in calculating the "annual rental" of the settled land, within the proviso at the end of sect. 13, sub-sect. iv., of the Act of 1890. By sect. 22, sub-sect. 5, of the Act of 1882, capital money is for all purposes of disposition, transmission, and devolution, to be considered land; and by sub-sect. 6, "income" of capital money invested is to be applied in the same way as income of land. Therefore, income of capital money must be included in arriving at the amount of "annual rental" in sect. 13, sub-sect. iv.

The structural repairs necessary to make this mansion-house habitable are of such an extensive character that they amount to a "rebuilding" within sect. 13, sub-sect. iv., in which case the trustees would be authorized in expending up to nearly £800 in "rebuilding."

According to the evidence, this house is uninhabitable. No one could be found to occupy it in its present condition. The improvements proposed, such as extra servants' rooms, are reasonably necessary and proper to enable the same to be let, and sub-sect. ii. of this sect. 13 applies.

[Chitty, J.:—This is not the kind of case that sub-section was intended to provide for. It often happens that trustees have on their hands an old house, which they come and tell me they cannot let because it has no billiard-room, or is without certain conveniences, which all tenants, according to modern ideas, would insist upon. Additions and alterations such as these I usually consider proper, and allow under this sub-sect. ii.; but before this section can apply, there must be an actual letting in contemplation. In the present case, the tenant for life proposes to occupy the house, and some of the proposed repairs and alterations are already done, and the money spent.]

The words of the sub-section are, "to enable the same to be let." There is nothing said about any immediate intention to let, or any offer by a tenant to take if repairs are done.

Bramwell Davis, for the next tenants for life and the trustees, raised no objection to the proposed expenditure.

CHITTY, J.:—

The first question I have to determine is, whether the income of a fund, representing the residuary personal estate of this testator, which this Court has already declared ought to be treated as held upon the same trusts as if it were capital money arising under the *Settled Land Act*, is, or is not, to be included in calculating the "annual rental" of the settled land, within the meaning of the proviso at the end of sect. 13, sub-sect. iv., of the *Settled Land Act*, 1890. In my opinion, this income ought to be so included. I must read the *Settled Land Acts*, 1882 and 1890, as one enactment, and turning to sect. 22, sub-sect. 5, of the Act of 1882, I find, in substance, that capital money, and securities representing the same, shall, for all purposes of disposition, be considered as land, and shall be held for the same persons successively, for the same estates and interests, as the land wherefrom the money arises would, if not disposed of, have been held; and then, by sub-sect. 6, the income of any investment of capital money is to be paid or applied as the income of that land, if not disposed of, would have been payable or applicable under the settlement. The result in the present case is, that the tenant for life here is entitled to the income of this capital money. Now sect. 13, sub-sect. iv., of the *Settled Land Act*, 1890, places a limit on the amount that may be expended in the rebuilding of the principal mansion-house: the amount is not to exceed one-half of the "annual rental." This sub-section would have strange results if the words "annual rental" are to be read as including only rent of land, and as excluding income derived from capital money invested. That, to my mind, would be a narrow and erroneous construction, as I cannot suppose that the Legislature intended that the amount to be applied in rebuilding under this sub-section (iv.), was to depend on the accidental circumstance, whether the settled land, or a portion of it, was at the particular moment land or money. Bearing in mind the scope and intention and general provisions of these Acts, I think that the reasonable construction to be put on these words "annual rental" is, that the expression is intended to apply to the total income of all the settled property, land as well as capital money invested; and I so hold.

CHITTY, J.
1892
In re DE TEISSIER'S SETTLED ESTATES.
In re DE TEISSIER'S TRUSTS.
DE TEISSIER *v.* DE TEISSIER.

Another point under sub-sect. iv. of the 13th section was, whether what had already been partially done to this mansion-house by the tenant for life, and what was proposed to be done, were improvements within this sub-section. Structural alterations and repairs, however extensive, do not, in my opinion, amount to a "rebuilding" of the principal mansion-house. It was not intended that alterations and improvements, much less repairs, should be paid for out of capital money, except in the special instances provided for by the Acts. I observe in the "improvements" added by the Act of 1890, sect. 13, that sub-sect. ii. speaks of "additions to or alterations" in buildings; and then sub-sect. iv. deals with "rebuilding," and I think this last sub-section means only what it says, and must be construed strictly, and confined to the actual rebuilding of the mansion-house. Consequently this sub-section has no application to the present case, at any rate, on the facts as now before me, which are not sufficient for me to hold that the proposed structural alterations amount to a rebuilding. I will, however, leave this point open for further consideration in Chambers, on additional evidence, if any there be; and if the tenant for life can shew that any of these proposed works, either on the mansion-house, the drainage, or the cottages, are within the *Settled Land Acts*, he will be at liberty to do so.

Another point raised was the construction of sub-sect. ii. of this same 13th section, and on this I think it is clear, that if the tenant for life is residing in the mansion-house, or contemplates residence there, as this tenant does, he cannot under this sub-section ask for capital money to be spent in making any additions to or alterations in the buildings. The additions or alterations contemplated must be reasonably necessary to enable the house to be let; but the Legislature did not intend that the tenant for life should be able to come to the Court and say: "I do not think this property will let in its present state of repair; let me have some of the capital money to make the necessary additions and improvements," otherwise a tenant for life might be constantly coming and making such applications, and the result would be that the capital money would be eaten up with these frequent repairs. No doubt this course would be very convenient

to tenants for life; but it is not what was intended. In my opinion there must be a present intention to let, if not an immediate prospect of letting, before any application under this sub-sect. ii. can be properly made. With this expression of my opinion on the questions that have been raised, which will be a guide for my Chief Clerk, the matter may be referred back to Chambers, to have the details of what is proposed to be done more fully considered.

The second summons by the trustees of the will was then proceeded with. It asked that the trustees might be at liberty to expend a sum not exceeding £1900 out of moneys in their hands representing the residuary personal estate of the testator, in repairing, altering, and improving *Bourne House*.

Upjohn, for the trustees:—

The Court has power under its general jurisdiction to allow this expenditure to be made out of the trust fund, in order to preserve this house from going to ruin; it is a case of salvage. We ask for such an inquiry as was directed in *Conway* v. *Fenton* (1), in which case the Court held that it had power under its general jurisdiction to sanction the expenditure of trust money on repairs.

[CHITTY, J.:—It was not "capital money under the *Settled Land Acts*" that was expended in that case; how can that case apply to this case where expenditure is asked for out of capital money?]

The Court has power under its general jurisdiction to make any payments it may think proper out of capital money: *In re Ormrod's Settled Estate* (2); true, part of the money has already been expended; but that need make no difference: *Jesse* v. *Lloyd* (3).

[CHITTY, J.:—Can the Court direct capital money to be expended in any other manner than that pointed out by the *Settled Land Acts*?]

Yes, by way of salvage. The jurisdiction conferred on the

(1) 40 Ch. D. 512, 518. (2) [1892] 2 Ch. 318.
(3) 48 L. T. (N.S.) 656.

CHITTY, J.

1892

In re DE TEISSIER'S SETTLED ESTATES.

In re DE TEISSIER'S TRUSTS.

DE TEISSIER *v.* DE TEISSIER.

Court under the *Settled Land Acts* is an additional jurisdiction, and is concurrent with its original or general jurisdiction: *In re Houghton Estate* (1); *In re Ormrod's Settled Estate* (2). The proposed outlay will be for the advantage of the infant remainderman, and may be authorized on the ground that it is of advantage to the trust estate: *In re Household* (3), [*In re Hotchkys* (4) was also referred to.]

Another case where this jurisdiction was exercised for the benefit of an infant's property was *In re Jackson* (5), and an inquiry, as directed there, as to absolutely necessary repairs, would be sufficient. There is the dry-rot that must be attended to at once.

[CHITTY, J.:—But not at the expense of the estate: that very point was decided by *Hibbert* v. *Cooke* (6).] [His Lordship also referred to *Dent* v. *Dent* (7).]

Bramwell Davis, for the next tenant for life and the infant tenant for life:—

Conway v. *Fenton* (8) has been approved of and followed in *In re Hurst* (9), and on behalf of the infant I support this proposed expenditure as being for the benefit of all concerned. It is for the benefit of the infant to have the repairs done now rather than wait till he comes into possession, when the house may be in ruins.

[CHITTY, J., referred to *Re Swanston* (10).]

CHITTY, J.:—

The main object of this summons is the same as the one under the *Settled Land Acts*, which I have already disposed of; the application now made by the trustees is addressed to what is termed the general jurisdiction of the Court, and, as counsel have stated it, the proposition is one of salvage—of preserving the inheritance. I quite agree with what has been said by other

(1) 30 Ch. D. 102.
(2) [1892] 2 Ch. 318.
(3) 27 Ch. D. 553.
(4) 32 Ch. D. 408.
(5) 21 Ch. D. 786.
(6) 1 S. & S. 552.
(7) 20 Beav. 363.
(8) 40 Ch. D. 512, 518.
(9) 29 L. R. Ir. 219.
(10) 31 Sol. J. 427.

Judges with regard to salvage; the propositions which are put forward at the Bar under that head are very often of a very loose character indeed, and the Court has to examine with care to see whether the case is one of salvage or not.

The present case starts with this fact, that what is proposed to to be done cannot be done under the *Settled Land Acts*. These Acts, as is well known, have provided, by means of most beneficial enactments, for the improvement of the real estate as a whole, and in the long list of improvements that are to be found in sect. 25 of the Act of 1882, and sect. 13 of the Act of 1890, there are many which the old Court of Chancery had no jurisdiction whatever to say might be done at the expense of the inheritance. But now, under these Acts, many things can be done by tenants for life, for the benefit of the estate, at the expense of the inheritance, some of which, perhaps, are more beneficial to those who are in possession than to those who come after them; a liberal view has been taken by the Court of these enactments, and a broad principle has been established, which has operated greatly to the advantage of landowners in general.

[His Lordship then stated the facts, commenting upon the circumstances that the testator had left the mansion-house in a very dilapidated condition, had made no provision in his will for repairs, and had made all the tenants for life unimpeachable for waste; and having referred to the fact that the trustees, being under no liability with regard to the repair of the house and not having the legal estate, had already expended £930 in repairs, continued:—]

Is this a case—assuming that the *Settled Land Acts* have not regulated the disposition of capital moneys so as to exclude any other disposition—in which under any settled doctrine of a Court of Equity, or under its general jurisdiction, apart from statute, the Court can apply the *corpus* of this trust fund in the way now proposed? Salvage has been pressed upon me: I cannot see that this is a case of salvage. I could understand that where a Court of Equity finds that a property has been condemned—say as a dangerous structure—by a local authority, and there are trustees who hold this property in trust for persons in succession, and the trustees come to the Court and say, "This property has

CHITTY, J.
1892
In re DE TEISSIER'S SETTLED ESTATES.
In re DE TEISSIER'S TRUSTS.
DE TEISSIER v. DE TEISSIER.

been condemned; the trust estate will be put to expense; the sanitary authority will enter and do the work, and will charge us with the cost; allow us, as trustees, for the benefit of all concerned, to anticipate the sanitary authority and do the work, and so save expense;" that in such a case as that, the Court would authorize the work necessary to protect the property, because there would be a legal demand—a *vis major*—by an external authority. But in the present instance I do not see that there is any case of salvage, in the proper sense of the term.

Then, again, the tenant for life, as was said by Sir *John Leach*, in *Hibbert* v. *Cooke* (1), may choose to occupy the mansion-house, as this tenant for life apparently intends to do: in that case Sir *John Leach* had the very point of dry-rot before him, the question being whether he would allow the expense occasioned by that to be paid for out of the testator's estate or to be charged upon the real estate; and with reference to expenditure occasioned or necessary in consequence of dry-rot, he refused to make any order, "considering that it was an expense to which a tenant for life choosing to occupy a mansion-house must submit." That is to say, the tenant for life, choosing to reside there, is at liberty, out of his own pocket and at his own expense, to put the house into the condition that is required in order to remove that which was a fatal defect in the house. That principle, so far as I know, has never been questioned. Sir *John Leach*, in refusing to make that order, refused to consider a case of remedying defects caused by dry-rot to be one of salvage, or one of preserving the house for the benefit of those entitled to the inheritance. No such argument as that appears to have been addressed to him; but I refer to the case to shew how any such argument would probably have been dealt with; and no authority has been produced to me in support of the proposition contended for by the trustees, under the general jurisdiction of the Court.

Then the case was put in another way by counsel who argued for the infant, the third tenant for life in remainder, when he suggested, that to make this expenditure now, would be for the benefit of all concerned; but, as I endeavoured to point out during the argument, and as was very well pointed out by the

(1) 1 S. & S. 552.

Master of the Rolls in *Ireland* in the case of *In re Hurst* (1), the Court does not possess plenary powers over the real estate of infants. The popular notion on the subject is an error. The Court of Equity has never assumed to dispose, just as it thinks fit, of an infant's estate. I have mentioned one or two leading points. At one time it was thought that the Court could order the sale of an infant's estate, because it was for the benefit of the infant. That notion was exploded as long ago as *Calvert* v. *Godfrey* (2). Then the Court of Appeal has laid it down that, in the case of an infant entitled to real estate absolutely in possession, the Court has no jurisdiction to charge that real estate for the purpose of advancing the infant, and that, too, in a case where it was eminently desirable that such an advance should be made if it could be made. That was the case of *Re Swanston* (3). I mention this, not by way of exhausting the matter, but for the purpose of shewing that the jurisdiction the Court exercises over the real estate of infants is, not to dispose of it at its will and pleasure, but practically it is to administer the estate.

There is another case I ought to mention: *In re Jackson* (4), where the present Lord Justice *Kay* had before him the case of an infant entitled to real estate in possession, and that real estate was in a very dilapidated condition; and he considered that that was a case where the benefit of the infant was concerned; and I think also he treated it as a salvage case; he directed a very limited inquiry as to what repairs, if any, were required that were absolutely necessary to be done. There he was dealing with the real estate of an infant in possession, and was considering what was for the benefit of the infant; and he did not consider that there was jurisdiction which would allow him to go beyond that very limited order, though the jurisdiction which was exercised was exercised in the interests, and for the benefit, of an infant entitled to the inheritance. Now, I come to contrast that with the case before me. I have here an infant tenant for life in remainder; I think that distinguishes the case at once from *In re Jackson*. How can I say it is for the benefit of an infant tenant for life in remainder, there being two

(1) 29 L. R. Ir. 219.
(2) 6 Beav. 97.
(3) 31 Sol. J. 427.
(4) 21 Ch. D. 786.

CHITTY, J.
1892
In re DE TEISSIER'S SETTLED ESTATES.
In re DE TEISSIER'S TRUSTS.
DE TEISSIER *v.* DE TEISSIER.

previous life estates before him, to allow this expenditure? Will he benefit by having the expenditure made at the expense of capital in which he is interested, when there are two life estates preceding him? It is said it is better to do these repairs now, rather than allow the house to get into a worse state of repair by the time that the infant comes into possession. It appears to me that is a proposition which goes beyond the limits that I am entitled to go; it is the tenant for life in possession at the present moment for whose benefit the repairs will chiefly be done—it is for the benefit of him and his family; he intends to reside there; and I have no evidence before me to shew that he is impecunious.

The case of *In re Hurst* (1), before the Master of the Rolls in *Ireland*, would not justify me in directing any inquiry in this case. Counsel have found themselves in a difficulty in stating in what terms they would ask for the inquiry. But I understand the result is, what repairs ought to be done to the house in order to put it into tenantable and habitable condition. Again, I say, at the risk of repeating myself, there is no precedent under the general jurisdiction for making such an order; and *In re Hurst* is no authority, because (to put only one point) the three infants, entitled under the will in succession were, in that case, entitled to reside in the house under the trusts of the will.

Then there is the case of *Conway* v. *Fenton* (2) before Mr. Justice *Kekewich*. There the legal estate, that is the property, was vested in trustees for the husband and wife for their lives, and afterwards for their children, who were infants and residing with them. The Court there did direct an inquiry in a form which is stated at the end of the report; but in that case there was a trust for sale, and, therefore, although there was no immediate intention of selling, there were the combined elements of all the persons interested then being before the Court, all persons interested living in the house or upon the estate, and a trust for sale, through the medium of which the learned Judge considered he could apply the doctrine of *Vyse* v. *Foster* (3), which is a well-established doctrine.

(1) 29 L. R. Ir. 219. (2) 40 Ch. D. 512. (3) Law Rep. 8 Ch. 309.

For these reasons, I think *Conway* v. *Fenton* (1) is distinguishable from the present case.

Now, there is one practical observation I make before I dispose of the case, and it is this: if I were to accede to this application, I foresee, in all cases where a testator leaves a dilapidated mansion-house, as he has done here, that there would be first an application by the tenant for life to see what he could get under the *Settled Land Acts*, and then, failing to obtain all he wished for under that jurisdiction, he would apply, in this ingenious manner, to what is called the general jurisdiction of the Court. The *Settled Land Acts*, whether they do or do not exclude the application of any of the doctrines of this general jurisdiction, at any rate afford a guide to the Court, and are of assistance to the Court in arriving at a proper conclusion. Confessedly, the things asked for on this summons cannot be done under the *Settled Land Act*, and unless the Court is firm in a matter such as this the Court will be flooded with similar applications.

In my opinion, the summons fails, and must therefore be dismissed; though, under the circumstances, I will allow the costs of it out of the residuary personal estate.

Solicitors: *Barnes & Bernard.*

(1) 40 Ch. D. 512.

W. C. D.

CHITTY, J. 1892 Nov. 10, 15, 16.

ECCLESIASTICAL COMMISSIONERS FOR ENGLAND *v.* TREEMER.

[1891 E. 1534.]

Lease for Lives—Sub-Lease—Surrender of Original Lease—New Lease for Lives—Recovery of Possession—Statute of Limitations—Statute 4 *Geo.* 2, *c.* 28, *s.* 6 [*Revised Ed. Statutes, vol. ii., p.* 89].

In 1805, *R.*, then Chancellor of the Cathedral Church of *St. Paul, London*, and parson of the parish church of *Ealing*, granted a lease for three lives of the glebe lands and hereditaments, of which he was seised in fee.

In 1807, the tenants under the lease of 1805 granted a sub-lease of part of the property for ninety-nine years, determinable on the dropping of the same lives as in the principal lease. The last of such lives dropped in 1874.

On the 24th of August, 1832, the persons then entitled to the lease of 1805 surrendered such lease to *R.*, and on the following day *R.* granted a fresh lease for three lives. The last of such lives dropped in 1891.

The Plaintiffs, who claimed through *R.*, had ever since the death of *R.*, in 1839, received the rent reserved by the lease of 1832.

The Defendants, claiming through the sub-lessee, had been since 1874 in actual possession of the lands without title.

The Plaintiffs claimed recovery of possession and mesne profits, on the ground that their title first accrued in 1891.

The Defendants claimed to be entitled in fee, on the ground that the Plaintiffs' title first accrued in 1874, and they claimed the benefit of the *Statute of Limitations*.

Held, that, by the lease of August, 1832, an immediate estate passed to the lessees therein named, and not a mere right in the nature of an *interesse termini* to a future estate, to come into existence on the determination of the sub-lease; and, moreover, that such lease was by virtue of the statute 4 Geo. 2, c. 28, s. 6, a valid lease, and was a lease which, passing an estate to the new lessees, prevented the grantor, and those claiming under him, from seeking to recover the lands till that lease had expired; and, therefore, that the Plaintiffs' title did not accrue till 1891 when the last life dropped.

Ecclesiastical Commissioners for England v. *Rowe* (1) discussed and explained.

BY an indenture, dated the 25th of August, 1805, the Rev. *Richard Richardson*, then Chancellor of the Cathedral Church of *St. Paul, London*, and parson of the parish church of *Ealing*, in the county of *Middlesex*, being seised in fee simple of the parson-

(1) 5 App. Cas. 736.

age of *Ealing*, and also of a close of land called the "*Nine Acres*," together with the other glebe lands and hereditaments to the said parsonage belonging, demised certain of such hereditaments and premises, being part of the "*Nine Acres*," to *Thomas Bramley*, *Thomas Smith*, the elder, and *Thomas Caldwell*, their heirs and assigns, from the date thereof, for and during the natural lives of *Edward Bullock*, *Thomas Jennings Bramley*, and *Thomas Smith*, the younger, and the life of the survivors and survivor of them.

The said *Thomas Bramley* died in the year 1806.

By a sub-lease dated the 4th of September, 1807, the said *Thomas Smith*, the elder, and *Susannah*, his wife, and *Thomas Caldwell* and *Sarah*, his wife, demised the said hereditaments and premises to *Ann*, Countess Dowager of *Galloway*, from the date thereof, for the term of ninety-nine years, if the said *Edward Bullock*, *Thomas Jennings Bramley*, and *Thomas Smith*, the younger, or any or either of them should so long live.

By divers assignments and assurances, and ultimately by an indenture dated the 3rd of November, 1825, the said hereditaments and premises became vested in *Elizabeth Le Cornn* for the residue of the term granted by the sub-lease of the 4th of September, 1807. *Elizabeth Le Cornn* died on the 5th of February, 1838, having made her will, which was proved the same month.

By an indenture of lease dated the 25th of August, 1832, the said lands and hereditaments were granted by the said *Richard Richardson*, as such Chancellor as aforesaid, to the said *Thomas Jennings Bramley*, *Thomas Smith*, the elder, and *Sarah Caldwell*, for the lives of the said *Thomas Smith*, the younger, and *Thomas Chaloner Smith*, and *Jemima Isabella Smith*, and the lives and life of the survivors and survivor of them, at the yearly rent of £24. The last-mentioned lease was expressed to be and was granted by way of renewal, and upon the surrender of the lease of the 25th of August, 1805; and on the 21st of September, 1832, possession of the said lands and hereditaments was taken by *William Woodruffe*, as the attorney of the said *R. Richardson*, and seisin of the same was delivered by him to *G. Osborne*, as the attorney of the lessees.

Under and by virtue of an Act of Parliament relating to the

CHITTY, J. 1892 ECCLESIASTICAL COMMISSIONERS FOR ENGLAND v. TREEMER.

Ecclesiastical Commissioners (3 & 4 Vict. c. 113), the said lands and hereditaments upon the death of the said *Richard Richardson*, in 1839, became absolutely vested in fee simple in the Plaintiffs (subject only to the said lease of the 25th of August, 1832).

On the 13th of July, 1871, the persons entitled to the said lands and hereditaments under the will of the said *Elizabeth Le Cornu* put the same up for sale by auction, purporting to sell the same as the owners thereof in fee simple, and at such sale the same were sold to *W. H. Waters*, and were conveyed to him by an indenture dated the 25th of April, 1872, and by an indenture dated the 29th of November, 1879, *Waters* conveyed the said hereditaments and premises to the Defendants, *E. A. Gibson* and *G. E. Waters*.

Edward Bullock, one of the persons named in the lease of the 25th of August, 1805, died on the 28th of March, 1850. *Thomas Smith*, the younger, another of such persons, and also one of the persons named in the lease of the 25th of August, 1832, died on the 14th of March, 1864, and *Thomas Jennings Bramley*, the survivor of such persons, died in the year 1874, and thereupon the sub-lease of the 4th of September, 1807, came to an end.

Thomas Chaloner Smith, one of the persons named in the lease of the 25th of August, 1832, died on the 4th of December, 1886, and *Jemima Isabella Smith*, the survivor of the persons named in the lease of the 25th of August, 1832, died on the 15th of June, 1891.

This was an action to recover possession of a house and premises known as No. 69, *Grove Road, Ealing*, built on a plot of land part of the "*Nine Acres*," and for mesne profits thereof since the 15th of June, 1891.

The Plaintiffs alleged that they had ever since the said parsonage, glebe lands, and hereditaments, became vested in them and down to the expiration of the estate for lives created by the lease of the 25th of August, 1832, received the rent for the time being payable thereunder in respect of the said lands and hereditaments or the parts thereof for the time being remaining subject to the said lease, and that upon the death of the said *Jemima Isabella Smith*, on the 15th of June, 1891, they became absolutely entitled in fee simple in possession to the

parts of the "*Nine Acres*" then remaining subject to the said lease, including the portion thereof the possession whereof they sought to recover.

The Defendants, on the other hand, alleged that the Plaintiffs' right to recover possession accrued in 1874 upon the death of the said *Thomas Jennings Bramley*, and that they and the persons through whom they derived their title had been in possession of the said hereditaments and premises since the death of *Thomas Jennings Bramley*, and had paid no rent in respect thereof, and they relied on the *Statute of Limitations* as a defence to the action.

Byrne, Q.C., and *B. B. Swan*, for the Plaintiffs:—

Our right to recover possession did not accrue till June, 1891, on the death of the last of the lives for which the lease of the 25th of August, 1832, was granted. That lease was by virtue of the 6th section of the Act of 4 Geo. 2, c. 28 a good and valid lease, and a freehold estate passed under that lease. It was binding on the Chancellor, and he had not at any time till the dropping of the last life in such lease, a right of entry or right to recover possession. He could not have brought an action to recover possession in 1874, when the sub-lease of the 4th of September, 1807, came to an end, nor could the present Plaintiffs have brought such an action as claiming through him.

Levett, Q.C., and *H. Terrell*, for the Defendants:—

The subsistence of the underlease of the 4th of September, 1807, at the date of the grant of the renewed lease of the 25th of August, 1832, wholly precluded the last-mentioned lease from operating as a valid lease and passing an immediate estate to the lessees therein named. Such lease only operated to confer on such lessees a right in the nature of an *interesse termini* to a future estate to come into existence and vest in possession upon the determination of the sub-lease. The existence of the sub-lease and the possession of those entitled to the estate thereby created, prevented the Chancellor, when he purported to grant the renewed lease of the 25th of August, 1832, from entering upon the land so as to make livery of seisin thereof as necessary

CHITTY, J. 1892 ECCLESIASTICAL COMMISSIONERS FOR ENGLAND v. TREEMER.

to perfect that lease. Moreover, it does not appear from the memorandum endorsed on the lease of 1832, that the tenants under the sub-lease assented to the livery of seisin, and it cannot be presumed that they did assent.

Swan, in reply.

[The following authorities were cited and referred to: *Corpus Christi College* v. *Rogers* (1); *Ecclesiastical Commissioners for England* v. *Rowe* (2); *Doe* v. *Walker* (3); *Doe* v. *Marchetti* (4); *Coe* v. *Clay* (5); *Drury* v. *Macnamara* (6); *Jinks* v. *Edwards* (7); *Pedder* v. *Hunt* (8); *Co. Litt.* (9); *Shepherd's Touchstone* (10); *Platt* on Leases (11); *Perkins'* Profitable Book (12).]

CHITTY, J.:—

This is an action by the Ecclesiastical Commissioners claiming possession of lands of which the Chancellor of the Cathedral Church of *St. Paul, London*, and parson of the parish church of *Ealing*, was seised in fee simple in his corporate capacity. The Defendants raise the *Statute of Limitations* against the claim. The Plaintiffs say that their right to recover possession first accrued to them in 1891. The Defendants say, on the other hand, that such right first accrued in 1874, and if that right first accrued in 1874 then the statute, which is a twelve years' statute now, constitutes a bar to the action. No question has been raised before me in argument upon the effect of the 29th section of the Act of 3 & 4 Will. 4, c. 27.

The facts are not in dispute. The Chancellor in 1805 granted a freehold lease to three tenants for lives. The last of the lives dropped in 1874. In 1807 the tenants under the lease of 1805 made a sub-lease of part of the property for a term of ninety-nine years, determinable however upon the dropping of lives, the lives being the same as the lives in the principal lease. Consequently such sub-lease ran out in 1874.

(1) 49 L. J. (Ex.) 4.
(2) 5 App. Cas. 736.
(3) 5 B. & C. 111.
(4) 1 B. & Ad. 715.
(5) 5 Bing. 440.
(6) 5 E. & B. 612.
(7) 11 Ex. 775.
(8) 18 Q. B. D. 565.
(9) 270 b.
(10) Pages 213, 276, 301.
(11) Vol. i. pp. 691, 788.
(12) Page 45, s. 220.

In 1832 there was a surrender made by the persons then entitled to the lease of 1805 to the Chancellor, the surrender being dated the 24th of August; and by an instrument dated the following day, as is usual, the Chancellor granted a new lease of the same property for three lives. This new lease was a freehold lease. The last of these three lives dropped in 1891, and that is the date when the Plaintiffs say their title accrued.

The Plaintiffs, who claim their title through the Chancellor by virtue of an Act of Parliament relating to the Ecclesiastical Commissioners (3 & 4 Vict. c. 113), and which title accrued to them in 1839 upon the death of the Chancellor, have received since the reversionary title accrued to them the rent reserved on the new lease of 1832 down to the determination of that lease. The Defendants, however, have been since 1874, when the sub-lease expired, in actual possession of the lands comprised in that sub-lease, which are the lands in question, without having paid rent. In other words, the Defendants since 1874 have been in possession of the land without title.

There were one or two points in the elaborate argument I have heard which I think in the result were dropped, and therefore it will not be necessary that I should do more than refer to them very shortly. One was that there passed by the new lease of 1832 an *interesse termini* only. I challenged counsel to produce any authority, the dictum of any judge, or the statement of any text-writer, applying that phrase to the case of a freehold, and it was properly admitted that no such authority, dictum, or statement could be produced. It is plainly the other way. The phrase *interesse termini* relates to the interest which the termor has before he has taken possession by force of the lease which has been made to him. I referred during the argument to a passage in *Coke* upon *Littleton* (1), where he points out the diversity between a lease for lives and for years with reference to the question of entering on the land. I could if necessary multiply authorities upon this point; but I am satisfied, and I think the counsel for the Defendants at last are satisfied, that the expression is never used with regard to a freehold lease. The object of this argument was to establish the point that no

(1) 270 b.

CHITTY, J. 1892 ECCLESIASTICAL COMMISSIONERS FOR ENGLAND v. TREEMER.

estate passed under the new lease of 1832 but a mere right to take possession.

Another matter which I will mention before I come to consider what I take to be the cardinal point of the case, namely the effect of the statute of 4 Geo. 2, c. 28, is an argument that was addressed to me with regard to the livery of seisin. The lease of 1832, or the counterpart, was produced in Court and read, and in that instrument there is the usual indorsement of livery of seisin. Livery of seisin was in 1832 required for the perfecting of a lease operating at Common Law and not through the statute of uses. Then it was said that the livery of seisin must have been imperfect, and by reason of its defects void, because it was not shewn that the *terre tenants*—that is the persons claiming under the sub-lease of 1807—had assented to the livery of seisin of the land. A passage from *Perkins'* Profitable Book was cited for the purpose of supporting that proposition. But the deed being more than thirty years old, and having regard to the law as to the presumption in favour of livery of seisin, I am of opinion that not only was there, as is shewn by the endorsement on the lease, livery of seisin, but that it was a valid livery of seisin, and on the principle with regard to such a matter that it is to be presumed that all things are rightly done, *omnia rite acta*, it must be presumed here that the tenant under the sub-lease did assent if his assent was required (about which there may be a question having regard to the statute). This point was raised also for the purpose of shewing that no estate passed by the new lease of 1832.

I will now refer to the 6th section, which is the important section of the Act of 4 Geo. 2, c. 28. In my opinion, it will be seen from that enactment that the entry on the land for the purposes of perfecting the new lease as against those who held under the sub-lease was justified. That section contains a preamble which shews the inconveniences that were proposed to be remedied, and is as follows: "And whereas many persons hold considerable estates by leases for lives or years, and lease out the same in parcels to several undertenants, and whereas many of those leases cannot by law be renewed without a surrender of all the underleases derived out of the same," that means, of course, they could not be effectually renewed—they could be renewed,

but not so as to interfere with the title of the sub-lessees, "so that it is in the power of any such undertenants to prevent or delay the renewing of the principal lease by refusing to surrender their underleases, notwithstanding they have covenanted so to do, to the great prejudice of their immediate landlords, the first lessees: For preventing such inconveniences, and for making the renewal of leases more easy for the future, be it enacted." Then the enactments divide themselves into three parts. The first relates to the validity of the new lease; the second refers to the relation between the sub-tenant and the new lessee; and the third refers to the rights of the chief landlord as against the sub-lessee. It is necessary for me with that preliminary statement, which I have made merely for the purpose of more readily dealing with the enactment, to read the enactment itself. "In case any lease shall be duly surrendered in order to be renewed, and a new lease made and executed by the chief landlord or landlords, the same new lease shall without a surrender of all or any the underleases be as good and valid to all intents and purposes as if all the underleases derived thereout had been likewise surrendered at or before the taking of such new lease"—that is, where a new lease is otherwise duly made and executed, it is made by this enactment valid to all intents and purposes as if the underlease had been surrendered. Consequently, stopping there for a moment, although I intend to read the rest of the enactment, the new lease of 1832 was a valid lease, and it was a lease which by passing an estate as it did to the new lessees prevented the grantor of the lease, that is, the Chancellor, from seeking to recover the land until that lease had expired or otherwise determined. This is the first part of the enactment. The second part is this: "All and every person and persons in whom any estate for life or lives or for years, shall from time to time be vested by virtue of such new lease, and his, her, and their executors and administrators, shall be intitled to the rents, covenants, and duties, and have like remedy for recovery thereof, and the underlessees shall hold and enjoy the messuages, lands, and tenements in the respective underleases comprised as if the original leases, out of which the respective underleases are derived, had been still kept on foot and continued."

CHITTY, J.
1892
ECCLESIASTICAL COMMISSIONERS FOR ENGLAND v. TREEMER.

By law, as it stood in 1731, when this Act of Parliament was passed, the effect of the surrender of the old lease would have been by itself, without the statute, to have left the underlessees without a reversion expectant on the termination of their underleases, and, inasmuch as that reversion which had been surrendered would have been gone the underlessees would have enjoyed the property without payment of rent and without observance of the covenants and conditions until the end of their current term. It is to remedy that that the Legislature has, in substance, made the new lease operate as a reversion upon the underlease carrying with it to the lessee of the new lease the right to insist upon being paid the rent and the right to insist upon all the other advantages whether by covenant, condition, or otherwise, which the old reversioners, that is the lessees entitled to the old lease, had as against the underlessee. In substance, it makes the new lease the reversion immediately expectant on the termination of the sub-lease, and then again it gives a corresponding right to the sub-lessees as against the new lessees, and it constitutes in this way the due relation of landlord and tenant between these parties.

That part of the enactment which I have just read protects, for all purposes, as one would expect the Legislature to do, the estate of the sub-lessees. But of course it does not deal with the case of a trespasser who comes into the property, as in the case before me, after the expiration of the sub-lease.

The third part of the enactment is as follows: "The chief landlord and landlords shall have and be intitled to such and the same remedy by distress or entry in and upon the messuages, lands, tenements, and hereditaments comprised in any such underlease for the rents and duties reserved by such new lease, so far as the same exceed not the rents and duties reserved in the lease out of which such underlease was derived, as they would have had in case such former lease had been still continued or as they would have had in case the respective underleases had been renewed under such new principal lease."

The chief landlord, that is in this case the Chancellor, after the grant of the new lease, could not by any proceeding have recovered possession as against the sub-lessee except in conformity

with this third part of the enactment, which, in substance, put him in the same position in regard to the underlessee as if the new lease had not been granted. The sub-lessees are again protected, because there is no greater burden imposed upon them by virtue of the new lease than was imposed upon them by virtue of the sub-lease that was subsisting.

I come now to what is obviously a critical point in this case. I ask, was the lease of 1832 a valid lease? The Act of Parliament says that it was a valid lease, and the extent of its operation is shewn by the other parts of the section which I have read. Consequently this seems to me to be the result, and the inevitable result. The Chancellor made a lease which was binding upon him, and there passed under that lease a freehold estate. He had not at any time until the dropping of the last life in the new lease a right of entry or a right to recover possession. If there had been breaches of covenants, the question would have been different; but I am laying aside now any such question. He could not have sued to recover possession during the currency of the new lease. That being so, I am unable to follow the argument that he could have brought an action to recover the land in 1874. Unquestionably those who took under the new lease could have brought such an action. But if I am right, as I think I am, on this point of the validity of the new lease as against the Chancellor, he could not have brought the action, nor could the present Plaintiffs have brought the action as claiming through him.

It is said that this construction would allow persons, by granting reversionary leases, to prevent the operation of the *Statute of Limitations*. It appears to me that that is an error. I am not dealing with a general case. I am dealing with a case that falls under the particular statute.

The Defendants' counsel relied upon Lord *Selborne's* speech in giving judgment in the case of the *Ecclesiastical Commissioners for England* v. *Rowe* (1).

In that case the statute of Geo. 2 had no bearing. There was not at the time of the granting of any of the new leases that are mentioned in the report, namely, those in 1828, 1834, 1842, and

(1) 5 App. Cas. 736.

CHITTY, J. 1892 ECCLESIASTICAL COMMISSIONERS FOR ENGLAND v. TREEMER.

1848, so far as appears from the report, any sub-lease existing. The observations that were particularly relied upon were those to be found at page 742, in which Lord *Selborne* deals with the question of the operation in point of law of a surrender and a new lease. His opinion would have been the same whether there is a formal surrender of the old lease, or whether there is simply a grant of the new lease, which operates in law, conditionally on the new lease being valid, as a surrender of the old. But not agreeing with the Court of Appeal in the case of *Corpus Christi College* v. *Rogers* (1), he expresses his opinion that there is a moment of time between the surrender in an ordinary case, and the grant of a new lease in contemplation of law, so that in a simple case the new lease is granted by virtue of an estate in possession. But the point of the observation which is pressed upon me is this: "I cannot assent to the argument addressed to your Lordships by the appellant's counsel, that the effect of a renewal contemporaneous with a surrender, is, to prevent the accruer of a right of action to the lessor by the surrender of the former lease against a disseisor or trespasser; an argument which seems to me inconsistent with the provisions as to reversionary estates contained in the 3rd and 5th sections of the *Statute of Limitations*, and which if well founded, would prevent that statute from ever running in favour of any length of possession whatever against a title to church leaseholds renewed from time to time in the manner which was formerly customary, and of which an example is found in this case." Lord *Selborne*, therefore, in that passage, was not dealing with the case that I have, of a valid sub-lease in existence at the time when the new lease of 1832 was granted, and which existing sub-lease carried with it the right to possession; nor a case where the possession also was, as is the case before me, being actually enjoyed by the persons entitled to the sub-lease, but he is speaking there of a trespasser, and I accede to the argument of the Defendants, that if in this case there had been a trespasser in possession of the land at the time when the new lease was granted in 1832, that would have fallen within the scope of these observations, which I again repeat were not with reference to the 6th section of the

(1) 49 L. J. (Ex.) 4.

statute of Geo. 2. That Lord *Selborne* was referring pointedly in these observations to the case of a disseisor or trespasser is not so plain from reading that passage itself, but it is plain from what appears towards the bottom of the page, where he again speaks of a disseisor or trespasser. In the case before the House of Lords, Mrs. *Moulton* was in possession at the time when the earliest of the new leases was granted. She, no doubt, had had what purported to be an assignment to her of the parcel of land which had passed, under an *Inclosure Act*, from *Morris*; but *Morris*, at the time when he purported to execute that assignment, as is plain from Lord *Selborne's* judgment (and that is one of the grounds of the judgment), had no right to the allotment, because he had sold the tenement in respect of which the allotment was made under the *Inclosure Act*, namely, in 1820, to *Hugh Jones*. Consequently, when the representatives of *Morris* in 1821 attempted thus to sell it to Mrs. *Moulton*, she acquired no title whatever. She had no title in possession, but she had the actual possession in her, and that possession was a wrongful possession—in other words, she was a trespasser, and the statute of Geo. 2 would have no operation, of course, with regard to a trespasser.

Without going further into the elaborate arguments which have been placed before me on the part of the Defendants, it appears to me the 7th section of the Act of 1874 (it is not necessary to refer in detail to the terms of it) cannot prevail, my principal ground being that the lease of 1832 was made a valid lease by the statute of Geo. 2, being otherwise a good lease as between the parties to it, and consequently that the estate passed by it and the Ecclesiastical Commissioners could not in derogation of the estate which had thus been lawfully granted, have brought an action to recover the land in 1874, and they are now entitled to recover possession; and this being a pure Common Law action to recover possession, I must give the Plaintiffs the costs if they ask for them.

Solicitors: *Jennings-White, Milles & Co.; Charles Sawbridge & Son.*

G. M.

NORTH, J. 1892 Nov. 26, 29.

THE GOVERNORS OF THE CHARITY FOR THE RELIEF OF THE POOR WIDOWS AND CHILDREN OF CLERGYMEN (COMMONLY CALLED THE CORPORATION OF THE SONS OF THE CLERGY) AND SKINNER.

[1892 S. 2775.]

Charity — Sale of Land — Consent of Charity Commissioners — Charitable Trusts Act, 1853 (16 & 17 *Vict. c.* 137), *ss.* 24, 62, 66 [*Revised Ed. Statutes, vol. xi., pp.* 988, 999, 1001]—*Charitable Trusts Amendment Act*, 1855 (18 & 19 *Vict. c.* 124), *ss.* 29, 48 [*Revised Ed. Statutes, vol. xii., pp.* 793, 797.]

Under the *Charitable Trusts Acts*, 1853 and 1855, the consent of the Charity Commissioners to the sale of land belonging to a charity is not required when the land is held on trust for the general purposes of the charity, and is not subject to any specific and particular trust distinct from those general objects.

SUMMONS under the *Vendor and Purchaser Act*, 1874, by a purchaser of real estate from the above corporation, asking for a declaration that the corporation could not sell the property without the consent of the Charity Commissioners, and that a good title had not been shewn thereto, because that consent had not been obtained.

The governors of the charity were incorporated under the above title by a Royal charter granted in 1678, which empowered the corporation to purchase, have, take, receive, and enjoy in fee and perpetuity, or for terms of lives, years, or otherwise, lands and hereditaments not exceeding the yearly value of £2000, and also all manner of goods, chattels, and things whatsoever, and to give, grant, sell, let, demise, alien, assign, and dispose of the said lands and hereditaments, &c. By subsequent licenses from the Crown the yearly value of the lands and hereditaments which might be purchased and held by the corporation was considerably increased.

The funds of the corporation were derived in part from the rents of land, and in part from voluntary subscriptions, donations and legacies, and investments thereof.

In March, 1717, some land situate at *Upper Whiston*, in

Yorkshire, was granted and released to three persons named, their heirs and assigns, to hold to them, their heirs and assigns, to the use of *Margaret Dolby*, for her life; with remainder to the use of *Tobias Dolby*, for his life; with remainder to the use of *Elizabeth Bayley*, for her life, she paying thereout the yearly sum of £10 for the support of poor charity children of the parish of *All Hallows, Lombard Street, London*; with remainder to the only proper use and behoof of the corporation and their successors for ever.

Ever since the date of this conveyance the corporation had been in possession of the land therein comprised, and had from time to time applied the rents and profits thereof for the general purposes of the charity.

On the 16th of May, 1892, the corporation entered into an agreement with *Samuel Skinner* for the sale of the land to him.

The purchaser took the objection that, by virtue of the *Charitable Trusts Acts*, 1853 and 1855, the consent of the Charity Commissioners to the sale was necessary, and required that that consent should be obtained. The corporation maintained that the consent was not necessary, and declined to apply for it.

This summons was taken out for the determination of the question.

Sefton Strickland, for the purchaser:—

Under sect. 29 (1) of the *Charitable Trusts Amendment Act*,

(1) The *Charitable Trusts Act*, 1853, speaks of the Commissioners as "the Board," and it provides, by sect. 24: "Upon application to the said Board by the trustees or persons acting in the administration of any charity, representing to the said Board that, under the special circumstances of any land belonging to the charity, a sale or exchange of such land can be effected on such terms as to increase the income of the charity, or would otherwise be advantageous to the charity, such Board may, if they think fit, inquire into such circumstances, and, if after inquiry they are satisfied that the proposed sale or exchange will be advantageous to the charity, may authorize the sale or exchange, and give such directions in relation thereto, and for securing the due investment of the money arising from any such sale or by way of equality of exchange for the benefit of the charity, as they may think fit."

Sect. 62 expressly exempts from the Act various corporations or institutions, such as the Universities and the British Museum, and "any institution, establishment, or society for religious or other charitable

NORTH, J.
1892
GOVERNORS OF THE CHARITY FOR THE RELIEF OF THE POOR WIDOWS AND CHILDREN OF CLERGYMEN (COMMONLY CALLED THE CORPORATION OF THE SONS OF THE CLERGY) AND SKINNER.

1855, the consent of the Charity Commissioners is necessary. This land is an "endowment" within the meaning of the Acts. It is held "for all the objects or purposes" of the charity. It is

---

purposes .... wholly maintained by voluntary contributions .... and where any charity is maintained partly by voluntary subscriptions and partly by income arising from any endowment, the powers and provisions of the Act shall, with respect to such charity, extend and apply to the income from endowment only, to the exclusion of voluntary subscriptions, and the application thereof; and no donation or bequest unto or in trust for any such charity as last aforesaid, of which no special application or appropriation shall be directed or declared by the donor or testator, and which may legally be applied by the governing or managing body of such charity as income in aid of the voluntary subscriptions, shall be subject to the jurisdiction or control of the said board, or the powers or provisions of this Act; and no portion of any such donation or bequest as last aforesaid, or of any voluntary subscription, which is now or shall or may from time to time be set apart or appropriated and invested by the governing or managing body of the charity, for the purpose of being held and applied or expended for or to some defined and specific object or purpose connected with such charity, in pursuance of any rule or resolution made or adopted by the governing or managing body of such charity, or of any donation or bequest in aid of any fund so set apart or appropriated for any such object or purpose as aforesaid, shall be subject to the jurisdiction or control of the said board or the powers or provisions of this Act."

By sect. 66: "The expression 'endowment' shall mean and include all lands and real estate whatsoever, of any tenure, and any charge thereon, or interest therein, and all stocks, funds, moneys, securities, investments, and personal estate whatsoever, which shall for the time being belong to or be held in trust for any charity, or for all or any of the objects or purposes thereof: and the expression 'land' shall extend to and include manors, messuages, buildings, tenements, and hereditaments, corporeal and incorporeal, of every tenure and description."

By sect. 1 of the Act of 1855: "'*The Charitable Trusts Act*, 1853,' hereinafter called 'the principal Act,' and this Act, shall be construed together as one Act, and any provisions of the principal Act inconsistent with this Act are hereby repealed."

By sect. 29: "It shall not be lawful for the trustees or persons acting in the administration of any charity to make or grant, otherwise than with the express authority of Parliament, under any Act already passed or which may hereafter be passed, or of a Court or Judge of competent jurisdiction, or according to a scheme legally established, or with the approval of the board, any sale, mortgage, or charge of the charity estate ...."

By sect. 48: "In the construction of the principal Act and this Act the word 'charity' shall include every institution in *England* or *Wales* endowed for charitable purposes, but shall not include any charity or institution expressly exempted from the operation of the Act of 1853."

true that in *The Governors of the Charity for the Relief of the poor Widows and Children of Clergymen* v. *Sutton* (1), Lord *Romilly*, M.R., expressed an opinion that the word "endowment" in sects. 62 and 66 of the Act of 1853, "has reference to an endowment made for some specific or particular purpose or trust," as distinguished from the general purposes of the charity. But that opinion was only a *dictum* not necessary for the decision of the case before him, for the land there in question had been purchased by means of the general funds of the charity. It was a mere investment of money in land, and for that reason the land could be converted into money again without the consent of the Commissioners. The same remark applies to *Royal Society of London and Thompson* (2), and *Finnis to Forbes* (3). The Acts were intended to curtail the powers of the trustees of charities to deal with their funds. It would be a very narrow construction to say that, if one field was given to the charity on trust for the relief of poor widows in *Wales*, and the adjoining field was given on trust for the relief of poor widows in *Great Britain*, the first could not be sold without the consent of the Commissioners, but the second could. There is no ground for such a distinction.

Cozens-Hardy, Q.C., and *Dibdin*, for the Corporation:—

It is clear that, up to the passing of the Act of 1853, the corporation had power under their charter to sell this land, or any other property belonging to them, and to apply the proceeds as income for the general purposes of the charity. The land was acquired for the general purposes of the charity; there was no specific trust. The corporation is plainly within the exemption contained in sect. 62 of the Act of 1853; it is a charity "maintained partly by voluntary subscriptions and partly by income arising from endowment," and therefore the Act is to apply to "the income from endowment only." There is no doubt an inconsistency between the language of sect. 66 and that of sect. 62, and the two sections can be reconciled only in the way which Lord *Romilly* pointed out, viz., by limiting the word "endowment" to an endowment for a specific purpose. The decision of

(1) 27 Beav. 651. (2) 17 Ch. D. 407.
(3) 24 Ch. D. 591.

NORTH, J. 1892

GOVERNORS OF THE CHARITY FOR THE RELIEF OF THE POOR WIDOWS AND CHILDREN OF CLERGYMEN (COMMONLY CALLED THE CORPORATION OF THE SONS OF THE CLERGY) AND SKINNER.

Lord *Romilly* is precisely in point; there is really no distinction between the two cases.

Strickland, in reply.

NORTH, J.:—

In my opinion the consent of the Charity Commissioners is not necessary. The *Corporation of the Sons of the Clergy*, as it is generally called, was established by Royal charter in the year 1678.

[His Lordship read from the charter the powers thereby conferred on the corporation as to the purchase, &c., and sale of land, and continued:—]

According to the agreed statement of facts the title of the corporation to the land now in question, arises under a deed dated in 1717, by which, for considerations which I am told were not pecuniary, the owners of the land granted and released it to three persons named, their heirs and assigns, to the use of *Margaret Dolby* for her life, with remainder to the use of *Tobias Dolby* for his life, with remainder to the use of *Elizabeth Bayley* for her life, she paying thereout a yearly sum of £10 for the support of poor children of a certain parish, with remainder "to the only proper use and behoof of the corporation and their successors for ever." There are, I think, no other words in the conveyance of any importance now.

This property remained vested in the corporation till in May, 1892, they entered into an agreement for the sale of it to Mr. *Skinner*. The purchaser is satisfied with the title except as to one point. He says, that the corporation, being a charity, cannot legally sell the property without the consent of the Charity Commissioners, and he requires that their consent shall be obtained. For some reason, which I do not know, it has not been thought desirable to apply for this consent; or, at any rate, it has been thought desirable that the corporation should be able to say that it is not necessary to apply for it. This question I have now to decide.

There can be no doubt that, down to the year 1853, the corporation might have sold this property as they pleased, or they

might have let it, and applied the proceeds for the general purposes of the charity. But it is said that the *Charitable Trusts Acts* of 1853 and 1855 have effected an alteration. The Act of 1853 is peculiarly framed, and there have been decisions upon it which certainly facilitate my decision upon the point with which I have now to deal.

[His Lordship read sect. 24 of the Act of 1853, and continued:—]

Therefore, powers are given by this section to do that which the trusts of the charity would not have authorized, and, if the sanction of the Commissioners is given, it is precisely the same thing as if the express trusts of the charity had authorized the thing to be done.

[His Lordship then read from sect. 66 the definitions given of "charity," "endowment," and "land," and continued:—]

There can be no doubt that those words of interpretation include under the phrase "endowment" all real estate and all personal estate; they do not say that all real and all personal estate shall constitute an "endowment," but that where the word "endowment" is used it is to apply to all real and personal estate. If the Act had not contained sect. 62 it would clearly have applied to the present corporation. But sect. 62 creates some very large exemptions from the Act, and, in my opinion, it makes no difference whether the exemption is effected by the original words of enactment applying only to particular things which are mentioned, those which are exempted being omitted from the enactment; or whether general words of enactment are used in the first instance, and there is a subsequent express exemption of those things which are to be excluded from the operation of the general words. It seems to me to come really to the same thing in the end. By sect. 62 the Universities, the British Museum, and other corporations and charities mentioned by name are exempted; and then come these words: "Any institution, establishment, or society for religious or other charitable purposes . . . . wholly maintained by voluntary contributions." Those cases are all entirely exempted from the Act. But the Legislature had to deal also with cases, many of which existed at that time, in which an institution for charitable

NORTH, J.
1892
GOVERNORS OF THE CHARITY FOR THE RELIEF OF THE POOR WIDOWS AND CHILDREN OF CLERGYMEN (COMMONLY CALLED THE CORPORATION OF THE SONS OF THE CLERGY) AND SKINNER.

purposes was maintained in part by voluntary contributions, and in part by other means; and the section proceeds next to deal with these cases. It provides that "Where any charity is maintained partly by voluntary subscriptions, and partly by income arising from any endowment, the powers and provisions of the Act shall, with respect to such charity, extend and apply to the income from endowment only, to the exclusion of voluntary subscriptions, and the application thereof; and no donation or bequest unto or in trust for any such charity as last aforesaid, of which no special application or appropriation shall be directed or declared by the donor or testator, and which may legally be applied by the governing or managing body of such charity as income in aid of the voluntary subscriptions, shall be subject to the jurisdiction or control of the said board, or the powers or provisions of this Act."

Pausing there, I may observe that I have not now to deal with a charity maintained wholly by voluntary subscriptions; it is clear that a charity so maintained is entirely outside the Act, and that a charity maintained partly by voluntary subscriptions and partly by income derived from endowment, is, so far as regards the voluntary subscriptions, also outside the Act. In such a case the Act is to apply only to the income derived from endowment, and not to the endowment itself. Sect. 62 says: "The provisions of the Act shall, with respect to such charity, extend and apply to the income from endowment only," and the word "endowment" includes, by virtue of the interpretation clause, any real and any personal estate. This being the provision, one can understand the meaning of the words which follow: "No donation or bequest unto or in trust for any such charity as last aforesaid, of which no special application or appropriation shall be directed or declared by the donor or testator, and which may legally be applied by the governing or managing body of such charity as income in aid of the voluntary subscriptions, shall be subject to the jurisdiction or control of the said board." Why are those words as to income introduced? Not because the capital is included, although the income is excluded, but because under the preceding words the endowment itself is excluded, except to the extent of its income; and those

words deal with income from endowment in aid of the voluntary subscriptions.

This is how the Act of 1853 stands, and to it an interpretation has been given, first by Lord *Romilly*, and afterwards by other Judges, who adopted his view. An endowment, which clearly cannot mean for the purposes of the Act every item of realty and every item of personalty which belongs to the charity, was defined by Lord *Romilly* in a case in which this very corporation were plaintiffs, as being an endowment "made for some specific or particular purpose or trust." The case is reported (1): and Lord *Romilly* said: "It is clear, from this language" (that is, of sect. 62), "that a donation or bequest would be an 'endowment'; but if invested, the income arising from it would be exempted from the control of the board; unless, to use the words of the Act, there was a 'special application or appropriation,' that is to say, an appropriation to some specific, as distinct from the general, purpose and object of the association. My opinion, therefore, founded on the consideration of this section, taken by itself alone, is, that the word 'endowment' has reference to an endowment made for some specific or particular purpose or trust. I use the words 'specific or particular purpose or trust' advisedly, because a gift of a sum of money to the corporation *simpliciter*, or a gift in trust for the furtherance of the objects and purposes for which the corporation was established, would be various ways of accomplishing the same end, namely, making a donation to the corporation itself." Just in the same way a donation or conveyance of land would be precisely the same thing as the donation of a large sum of cash or consols, or other securities. Then Lord *Romilly* continues: "What words would amount to and constitute a 'particular and specific trust,' so as to bring a bequest or donation within the meaning of the word 'endowment,' according to the sense in which it appears to have been used in this section, taken alone, it is not necessary for the present purpose to consider, as no such question arises; when it does, the Court must determine it." Then (2) he says that the only way in which in his opinion sects. 62 and 66 can be reconciled is, "to retain the interpretation I have already given to the

(1) 27 Beav. 651, 663. (2) 27 Beav. 665.

NORTH, J. 1892 GOVERNORS OF THE CHARITY FOR THE RELIEF OF THE POOR WIDOWS AND CHILDREN OF CLERGYMEN (COMMONLY CALLED THE CORPORATION OF THE SONS OF THE CLERGY) AND SKINNER.

word 'endowment' in sect. 62, viz., the devotion of property to a specific and particular trust, and to give it the same meaning in sect. 66 (the interpretation clause), that is, to hold that the meaning of this clause is not to enact that the possession by any charity of any property of the various kinds there enumerated constitutes an 'endowment;' but that property of all the classes and character there specified may be made the subject of 'endowment'; and therefore land, money, every species of real and personal property whatsoever, including even personal chattels —provided any such were, either by the will of the donor or otherwise, impressed with a particular and specific trust—may be made the subject of 'endowment' in favour of the charity." In that case Lord *Romilly* did not decide what the meaning of "a particular and specific trust" is, and I do not pretend to give any precise definition of it. But I find in the very deed of 1717, by which land was conveyed to the corporation, an instance of such a trust, because, after the first two life estates, the property is limited "to the use of *Elizabeth Bayley* for her life, she paying thereout a yearly sum of £10 for the support of poor charity children of the parish of *All Hallows, Lombard Street, London.*" That clearly is a "particular and specific trust:" but, when we come to the remainder, which is "to the only proper use and behoof of the corporation, and their successors for ever," that clearly is not "a particular and specific trust" of any kind. It is a gift to the corporation out and out in terms which would, if they were not a charitable corporation, enable them to apply the property for any lawful purpose, just as they could apply subscriptions; but, being a charitable corporation, it means that they are the owners of the property in fee for the purpose of the charity which they have to administer.

It has been suggested that this land could not be applied as income in aid of the voluntary subscriptions. I do not see the force of that observation. That would be so also in the case of personal estate not being actual cash. By the charter this corporation have power to deal with, not only real estate, but personal estate, and not only cash, but "goods, chattels, and things whatsoever," and those "goods, chattels, and things" could

not, without conversion in some way or sale, be applied in aid of the income arising from voluntary subscriptions.

So far, therefore, as the Act of 1853 goes, it seems to me that this corporation is clearly exempted from its operation. Then I turn to the Act of 1855. [His Lordship read sect. 29, and continued:—]

No doubt, as Vice-Chancellor *Bacon* pointed out, if we had merely to consider the earlier Act and sect. 29 of the later Act, nice questions would arise as to how far the provisions of sect. 29 had superseded or got rid of sect. 62 of the earlier Act. But then there is sect. 48 of the later Act. [His Lordship read sect. 48.] Now sect. 29 speaks of the "charity estate," and sect. 48 says what meaning is to attach to the word "charity"; it is not to include a charity which is expressly exempted from the operation of the Act of 1853. In my opinion, therefore, this corporation is exempted by the Act of 1853, and although, by virtue of the first part of sect. 48 of the Act of 1855, sect. 29 of that Act would include the present case, yet, by virtue of the latter part of sect. 48, sect. 29 is excluded from application. The words in sect. 48, "shall not include any charity or institution expressly exempted from the operation of the Act of 1853," in my opinion, do not merely mean, a charity or institution which is wholly exempted, as being maintained, for instance by voluntary contributions only, but include also any charity or institution which is expressly exempted in part from the operation of the Act. Sect. 48 applies to such a charity so far as the Act of 1853 exempts it from its operation.

The result is that, in my opinion, the Act of 1855 has made no difference. We are, therefore, thrown back upon the Act of 1853, and under that Act the consent of the Charity Commissioners is not necessary to this sale. I will make a declaration accordingly.

The costs of the application must be paid by the purchaser.

Solicitors: *Maudes & Tunnicliffe*, agents for *Marsh & Son Rotherham; Bridges, Sawtell & Co.*

W. L. C.

STIRLING, J.
1892
Oct. 25, 29.

In re BOURNE.
MARTIN *v.* MARTIN.

[1892 B. 2422.]

Administration—Probate Duty—Estate Duty—Incidence—Specific and Residuary Legatees—Customs and Inland Revenue Act, 1881 (44 & 45 *Vict.* c. 12), *ss.* 27, 41—*Customs and Inland Revenue Act*, 1889 (52 & 53 *Vict.* c. 7), *s.* 5.

The incidence of the new duties imposed by the *Customs and Inland Revenue Act*, 1881, s. 27, and the *Customs and Inland Revenue Act*, 1889, s. 5, is governed by the same principle as that which regulated the incidence of the old probate duty, namely, that it should be borne by the general residuary personal estate.

The testatrix, who died in 1891, by her will, dated in 1870, after making certain pecuniary bequests and specific gifts of property, partly real and partly personal, and disposing of the residue of her real estate, gave the residue of her personal estate to *M.* absolutely :—

Held, that the stamp duty payable under sect. 27 of the *Customs and Inland Revenue Act*, 1881, and the estate duty payable under sect. 5 of the *Customs and Inland Revenue Act*, 1889, must be paid by *M.* alone, and not rateably by him and the specific legatees.

In re Croft (1) distinguished.

THE testatrix, *Anna Sturges Bourne*, by her will, dated the 18th of March, 1870, after appointing *George Edward Martin* and the Rev. *William Martin* to be her executors, and making certain pecuniary bequests and specific gifts of real and leasehold estates, devised and bequeathed all other her real estate, whatsoever and wheresoever situate, and certain sums of Reduced and New Three per Cent. Annuities, and all other moneys, stocks, shares, funds, and securities representing the residuary personal estate, and the proceeds of the sale of the real estate of her late father, and also a certain sum of Consolidated Bank Annuities, to which she was entitled under the marriage settlement of her late father, to her executors upon trust for sale and conversion, and to divide the moneys arising therefrom equally between the children and issue of the Rev. *George Martin* and the Rev. *William Martin* (both then deceased), in manner

(1) [1892] 1 Ch. 652.

therein mentioned; and she gave all the residue of her personal estate and effects to *George Edward Martin* absolutely. The testatrix made a codicil, dated the 10th of September, 1890, by which she revoked the appointment of the Rev. *William Martin* as executor and trustee of her will, and appointed the Rev. *Richard Martin* to be an executor and trustee in his place, but did not in any other way alter the disposition of the will, so far as it is material now to state.

The testatrix died on the 9th of December, 1891, and her will and codicil were proved by the executors, the Rev. *Richard Martin* and *G. E. Martin*.

This was an originating summons taken out by the Rev. *Richard Martin* for the determination of the following questions: (1.) Whether the stamp duty which, under sect. 27 of the *Customs and Inland Revenue Act*, 1881, had become payable in respect of the estate of the testatrix, ought to be paid by the Defendant, *G. E. Martin*, alone as the residuary legatee under the will and codicil, or whether such stamp duty ought to be paid rateably by the Defendant, *G. E. Martin*, and by such of the children and issue of the Rev. *G. Martin* and the Rev. *W. Martin* respectively as were entitled to take under the trusts of the will and codicil.

(2.) The like question as to the estate duty payable under sect. 5 of the *Customs and Inland Revenue Act*, 1889.

Badcock, for *G. E. Martin*:—

The burden of the stamp duty should be borne rateably by the specific and residuary legatees. Sect. 41 of the Act of 1881 provides that where duty has been paid under the Act, in respect of any legacy, residue, or share of residue, the 1 per cent. duty imposed by the Act 55 Geo. 3, c. 184, shall not be payable. The section, therefore, gives relief to both legacies and residue, and that would not have been the case if the Legislature had intended the residue to bear the burden of the new duties alone.

In *In re Croft* (1), Mr. Justice *Kekewich* held that the account duty payable under sect. 38, sub-sect. 2, of the Act of 1881, and

(1) [1892] 1 Ch. 652.

STIRLING, J. 1892 *In re* BOURNE. MARTIN *v.* MARTIN.

sect. 11 of the *Customs and Inland Revenue Act*, 1889 (52 & 53 Vict. c. 7), must be borne by all the appointees under a voluntary settlement, rateably according to their respective shares, and not by the residuary appointee exclusively. I submit that that authority governs the present case, and that both the stamp duty and the estate duty are payable rateably.

[He also referred to *Trethewy* v. *Helyar* (1), and to sects. 27 and 38 of the Act of 1881.]

C. Gurdon, for the beneficiaries under the will other than *G. E. Martin*:—

In re Croft (2) does not apply first, because it was a case of a settlement, and, secondly, because there the contest was not, between specific and residuary legatees, but between the appointees of various portions of a specific fund.

The duties should be paid out of the residue.

[He also referred to *Trethewy* v. *Helyar* and *Fenton* v. *Wills* (3).]

Badcock, in reply.

1892. Oct. 29. STIRLING, J. (after referring to the terms of the will, continued):—

The will, therefore, is, for the purpose of this judgment, of the simplest character. The residuary devise is according to the decision in *Hensman* v. *Fryer* (4), a specific devise. The will, therefore, amounts to a specific gift of property consisting partly of realty and partly of personalty, followed by a gift of the residue of the testatrix's personal estate. The question is whether the duties are payable in part out of the property specifically given or whether they must be paid entirely out of the residuary personal estate. Now let us consider how the law stood before the passing of the Acts mentioned in the summons. Down to 1880 there was payable by the executor or administrator a probate duty, which was a stamp duty imposed by the Act 55 Geo. 3, c. 184, and certain other Acts incorporated therein by reference. The general effect was that the executor was

(1) 4 Ch. D. 53.
(2) [1892] 1 Ch. 652.
(3) 7 Ch. D. 33.
(4) Law Rep. 3 Ch. 420.

compelled to stamp the probate or letters of administration with a stamp which denoted payment of duty upon property of a certain value subject to the probate: see 41 Geo. 3, c. 86, s. 3. Then how, under the old law, was that paid? The Acts which impose the duty contain no directions as to the property out of which it is payable. In that respect, they are very different from the *Legacy Duty Act* (36 Geo. 3, c. 52, ss. 6, 24), which contains elaborate provisions which shew that the duty is to fall upon the legatee. There is no question as to how the probate duty was, in fact, paid under the old law. According to the regular practice it was paid out of the general residuary personal estate. It was a testamentary expense which had to be incurred by the executor in order to obtain a valid probate which was the evidence of his title, and the burden of it did not fall upon the specific legatees, and still less upon the specific devisees. Counsel have not been able to find any decision establishing that practice, and I am not surprised that that should be so, as, upon principle, it seems clear that it was right. The principle is laid down by Lord *Selborne* in *Robertson* v. *Broadbent* (1). He says this: "The principle of the exemption of personal estate specifically bequeathed is, that it is necessary to give effect to the intention apparent by the gift. If the bequest is of a particular chattel, such as a horse or a ship, it is manifest that the testator intended the thing itself to pass unconditionally, and in *statu quo*, to the legatee; which could not be if it were subject to the payment of funeral and testamentary expenses, debts, and pecuniary legacies." I may mention, as an illustration of that, what we know to have been the law as to specific gifts of property subject to incumbrances. Before *Locke King's Act* the specific devisee was entitled to have the incumbrance upon the property devised to him discharged out of the testator's personal estate. That has been altered as regards incumbrances upon real estate subsisting at the death of the testator; but the Act does not apply to personal estate, as to which the old law still applies, as is shewn by the judgment of the late Master of the Rolls in *Bothamley* v. *Sherson* (2). If the general personal estate is insufficient the executor or administrator would be entitled to be indemnified out of such funds as

(1) 8 App. Cas. 812. (2) Law Rep. 20 Eq. 304, 314.

STIRLING, J. 1892 *In re* BOURNE. MARTIN *v.* MARTIN.

came to his hands by virtue of the probate, and in such a case, and in this way, the specific legatee might be called upon to pay or contribute to the payment of the probate duty; but unless the general personal estate fails the specific legatees are not chargeable with it. The law was first altered by the *Customs and Inland Revenue Act*, 1880 (43 Vict. c. 14), which simply altered the scale of duties, sect. 9 substituting new duties for the old. Then came the *Customs and Inland Revenue Act*, 1881 (44 & 45 Vict. c. 12), sect. 27 of which abolished the duties upon probates of wills and letters of administration, and in substitution for them imposed certain duties on the affidavits required by a subsequent section. Sect. 28 of that Act gave to the executor or administrator a power, which he had not before, to deduct the aggregate amount of the debts and general expenses from the value of the estate in estimating the amount chargeable with duty. Sect. 29 makes provision as to the affidavit required from the person applying for the probate or letters of administration. Sect. 30 provides that probate, and letters of administration are to bear, instead of stamp duty, a certificate shewing that the affidavit has been delivered, and, if liable to duty, duly stamped, and stating the gross value of the estate. Sect. 38 imposes fresh stamp duties upon property passing under voluntary settlements and by *donationes mortis causâ*. Sect. 41 provides that, "In respect of any legacy, residue, or share of residue payable out of, or consisting of any estate or effects according to the value whereof duty shall have been paid on the affidavit or inventory or account, in conformity with this Act, the duty at the rate of 1 per cent. imposed by the Act 55 Geo. 3, c. 184, shall not be payable; and in respect of any succession to property according to the value whereof duty shall have been paid on the affidavit or inventory or account in conformity with this Act, the duty at the rate of 1 per cent. imposed by the *Succession Duty Act*, 1853 (16 & 17 Vict. c. 51), shall not be payable." In this Act there is not to be found, any more than in the *Probate Duty Acts*, any intimation as to how the probate duty is to be paid; and it seems to me that the principle which governed the incidence of the old duties must govern these new duties, which are substituted for them. It is contended, however, that the present

case is governed by *In re Croft* (1). If I thought that that case was in point, I should consider it my duty to follow it; but, in my opinion, it is not in point. It relates to the duty imposed by sect. 38 upon voluntary settlements. It does not relate to the incidence of the duty as between specific and residuary legatees in the ordinary sense, but between appointees of various parts of a specific fund. In that case Mr. Justice *Kekewich* came to the conclusion that, in the absence of any provision by the Legislature as to the incidence of the duties, regard must be had to the intention of the settlor. It seems to me that that general principle is applicable as between specific and residuary legatees, but that, as is laid down by Lord *Selborne* in *Robertson* v. *Broadbent* (2), the intention is that the specific legatees are to take what is bequeathed to them free from all testamentary expenses, including the duty. Reliance was placed upon sect. 41 of the Act of 1881, and it was said that that section indicates that the legacies are to bear their share of the duty, because in some cases it relieves legacies from the legacy duty formerly borne by them, on the ground of their being liable to the increased probate duty imposed by the Act. That is a section of a limited application. It only applies in cases where the duty is payable at 1 per cent. —*i.e.*, where the persons who take the benefits under the will are members of the testator's family. No doubt the Act relieves the specific legatees as well as the residuary legatee; but I cannot infer from that that it was the intention of the Legislature that the incidence of the duty should be altered. If the general estate were insufficient, the legatees might have to bear the duty, and if they were persons who were liable to pay 1 per cent. then the intention of the Legislature seems to be that they should be relieved. I think that the incidence of the duty remains as under the old Acts, and no part of it ought to fall upon the specific legatees so long as there is any general residue. The second question is as to the estate duty which is payable under sect. 5 of the *Customs and Inland Revenue Act*, 1889 (52 & 53 Vict. c. 7). Sub-sect. 5 of that section provides that the duties imposed by the section "are to be in addition to the stamp duties charged on the affidavit required from persons applying

(1) [1892] 1 Ch. 652. (2) 8 App. Cas. 812.

STIRLING, J. for probate or letters of administration in *England* or *Ireland*. . . .

1892

In re BOURNE. MARTIN *v.* MARTIN.

and in addition to the stamp duties charged on such accounts of personal and moveable property as are specified in sect. 38 of the *Customs and Inland Revenue Act*, 1881, as amended by this Act." That is simply an addition to the stamp duty, and it was admitted at the Bar that, for the purpose of the present application, no distinction could be made between the duties chargeable under sect. 27 of the Act of 1881, and those chargeable under sect. 5 of the Act of 1889. I think the same rule applies in the case of this duty, and it must be borne by the residuary legatee alone.

Solicitors for all parties: *Frere, Forster & Co.*

G. A. S.

TUCKER *v.* VOWLES.

ROMER, J.

[1891 T. 1461.]

1892

Nov. 8, 9, 10.

Vendor and Purchaser—Restrictive Covenants—Property sold in Plots—Building Scheme—Representations by Vendor—Plan—Printed Form of Agreement.

If a vendor prepares a plan of a building estate shewing lots with houses marked on them, and an intending purchaser is shewn that plan, and his agreement with regard to a plot purchased by him happens to be on a printed form with written alterations, the purchaser is not entitled to assume that the whole estate is governed by a building scheme that each plot shall, without variation, be built on strictly in accordance with the indications on the plan, and shall of necessity be governed by the printed portions of the agreement.

V. and *S.* offered a landed estate, belonging to them, in plots as building sites at fee-farm rents. A plan, prepared originally for the approval of the local sanitary authority, shewed the estate cut up into plots of even size, on each of which the ground plan of one house, and no other building, was delineated.

During negotiations for a conveyance of some of the plots, *H.* was shewn a tracing of the plan (by reference to which he selected his plots), and was informed by the vendors that the houses were to be of a superior class, and worth at least £800 each, and that on certain plots pointed out the erection of stables would also be permitted.

H. signed an agreement to take conveyances of four plots, the principal parts of which agreement were printed; and one of the printed clauses provided that the grantee should not erect on any plot any dwelling-house or building, other than a dwelling-house worth £800 (except a greenhouse of a specified description).

H. erected a dwelling-house of the required value on each of his plots, and took a conveyance (of each plot) by which he covenanted not to alter the external elevation of his buildings, and not to erect any other building except a greenhouse.

V. subsequently acquired the interest of *S.* in other plots, facing those of *H.*, and erected thereon a billiard-room, conservatory, and stables as adjuncts to his own house; but his conveyance contained no restrictive covenant except that he would not erect any building without the approval of *S.*, which he obtained before proceeding to build:—

Held, that *H.* had no cause of action in respect of the erection of the buildings of *V.*

IN the year 1885 the Defendant, *William Vowles*, and one *James Rowe Shorland* (referred to below as "the grantors"),

ROMER, J. 1892 TUCKER v. VOWLES.

purchased freehold property at *Redland*, in the city of *Bristol*, known as the *Redland House* estate, consisting of a mansion-house and about six acres of ground; and, after disposing of the mansion-house and about an acre of the ground, they retained the remaining five acres for the purpose of developing and disposing of the same as a residential building estate. For this purpose the land retained was cut up into forty-six plots of equal or nearly equal size, all of which were afterwards offered to the public as building sites at fee-farm rents.

Before offering the land to the public the grantors had a plan of it prepared, shewing the proposed roads and drainage works, and representing the land intended to be disposed of divided into such plots as above stated. Upon each of the plots so represented, except one, there was indicated on the plan in red the site of a semi-detached house, but not of any other building.

The plan was then submitted to, and was eventually approved by, the *Bristol* Urban Sanitary Authority, and the Defendant alleged that it was prepared for the sole purpose of satisfying the requirements of the sanitary authority in respect of the roads and sewers to be made, and the general building-lines to be observed upon the property. The original plan, after being passed by the sanitary authority, was deposited with them as required by their by-laws; but a copy of so much of it as represented the forty-six plots was framed and hung up in the office of the grantors' solicitors, and intending grantees, upon applying for plots, were shewn the plan so displayed or a copy of it, and selected their plots by reference thereto. There was also produced to such intending grantees a printed form of agreement, which was in general use upon the estate, in which blanks were left for the names, dates, rents, numbers of plots, &c., and upon completion of the negotiations this was filled up and signed, substantially as printed, but occasionally with written alterations and additions in respect of minor matters. The said form of agreement contained (*inter alia*) the following clauses:—

"1. When the dwelling-house hereinafter agreed to be built is completed and made fit for habitation to the satisfaction of

the grantors or their architect or surveyor, the grantors will grant and convey all th—— plot —— of land, being part of the garden heretofore belonging to and occupied with *Redland House, Redland*, in that part of the parish of *Westbury-on-Trym* which is in the city of *Bristol*, and which plot —— of land —— delineated on the plan hereto, and —— thereon coloured pink, to the use that the grantors, their heirs and assigns, may from the —— day of ——, 188 , receive out of —— the said plot —— of land and the dwelling-house thereon the yearly fee-farm rent of £——, to be charged upon —— the plot of land payable," as therein mentioned, "and subject to such fee-farm rent, and to the powers and remedies for the recovery thereof, to the use of the grantee, his heir and assigns, for ever.

"2. The grantee may immediately after the signing of this agreement enter upon the said plot —— of land and erect the buildings and otherwise proceed with the works contemplated by this agreement.

"3. The grantee shall within one calendar month after obtaining possession of —— the said plot —— of land, fence in the same —— with good stone walls, not less than the heights shewn on the plan hereto, and coped with native stone on edge, or brick and freestone, and shall before the —— day of ——, 188 , at his expense, under the inspection and to the satisfaction of the grantors or their architect, build, cover in, and completely finish fit for habitation, with all proper materials and in a good, substantial, and workmanlike manner, upon —— the said plot —— of land a good and substantial dwelling-house ——, such dwelling-house —— to have proper offices and out-buildings, and to be built according to a plan and elevation to be first submitted to and approved by the grantors or their architect or surveyor, and under the inspection of the grantors or such architect or surveyor, and will lay out and expend on the erection of —— the said dwelling-house —— £800 at least.

"9. —— grant, in addition to a covenant to erect, complete, and finish the dwelling-house therein mentioned in accordance with this agreement, shall contain the following covenants by the grantee . . . . Not to alter or add to the original external elevation or plan of the dwelling-house without the written consent of the

ROMER, J.
1892
TUCKER v. VOWLES.

grantors, their heirs or assigns; not to erect on the plot of land any dwelling-house or building, other than the dwelling-house hereby agreed to be built thereon, except at the back of such dwelling-house a greenhouse or conservatory, the same not to exceed thirteen feet in height from the ground, the elevation thereof in every such case to be first submitted to and approved by the grantors, their heirs and assigns, or their architect or surveyor . . . . and that no wall bounding the plot of land shall be carried higher than is shewn on the plan hereto . . . . And not to carry on or permit to be carried on upon the premises, or any part thereof, any trade or business whatsoever, or to use the same for any other purpose than as a private dwelling-house or lodging-house or school, without the consent in writing of the grantors, their heirs and assigns."

There was no express reference upon the said plan, or in any document, to any building restrictions or scheme as governing the whole estate.

In or about March, 1887, *Arthur Herridge*, a builder (who was not originally a party to the action, but was afterwards added as a Plaintiff), entered into negotiations with the grantors for a grant to him of plots upon the estate. In the course of such negotiations the plan displayed in the office of the grantors' solicitors was produced to him, and he was told that it represented the manner in which the estate would be built upon, and further that upon certain plots, which were pointed out to him thereon, stables might be erected. The plots so pointed out to him were some six or seven, to which there was a back entrance or a passage, represented upon the plan. Ultimately *Herridge* selected and agreed to take the plots Nos. 1 to 4 upon the plan, and situate in a road called *Iddesleigh Road*; and on the 27th of March, 1887, he signed an agreement with the grantors substantially in the printed form. The plan thereto did not indicate the height of any boundary walls. The agreement contained an additional proviso in writing that the front boundary walls of the houses to be erected should not exceed 2 ft. 6 in. in height, and should be surmounted by iron railings not exceeding 2 ft. 6 in. in height.

The houses to be erected upon the plots taken under the said

agreement were completed, and by four several indentures, two dated the 25th of October, 1887, and the others dated the 17th of December, 1887, the four plots were granted to *Herridge* at fee-farm rents of £18 for each plot, and subject as to each plot to such restrictive covenants as were mentioned in the printed form of agreement.

The Plaintiff, *C. H. Tucker*, was the second mortgagee of the four plots and the houses thereon, under two indentures of mortgage, dated respectively the 12th of April, 1888, and the 1st of May, 1888, and in the case of each plot the mortgage was made subject to the restrictive covenants aforesaid.

C. H. Tucker resided in the house upon plot 4, having entered into possession thereof and also of plot 3 and the house thereon, under his mortgage.

William Vowles was the owner of plots 5 to 12 upon the said plan, situate in *Iddesleigh Road*, on the side opposite the Plaintiff's property, having acquired from *J. R. Shorland* his undivided moieties thereof respectively. Plots 5 and 6 were acquired by *William Vowles* as aforesaid before the date of the grants to the Plaintiff *Herridge*, and in respect of these the Defendant *W. Vowles* had entered into such restrictive covenants as had been required from *Herridge* in respect of his plots, and had built thereon accordingly; but in respect of the remaining plots, 7 to 12, which were not acquired by the Defendant as aforesaid until the year 1891, the only building covenant entered into by him was a covenant with *J. R. Shorland* not to erect any building or buildings thereon without first submitting plans thereof to *J. R. Shorland*, and obtaining his approval thereof—which conditions *Vowles* complied with before commencing to build.

Most of the plots had been disposed of, some of them having been acquired by *J. R. Shorland*, who purchased the undivided moieties thereof of *W. Vowles*, except in the case of plots 1 to 12, acquired by the Defendant as aforesaid, and of the plot upon which no house was indicated upon the plan. Each grantee or purchaser, including *J. R. Shorland*, had entered into restrictive covenants substantially the same as those provided for by the printed form of agreement and required from the Plaintiff *Herridge*, the only material variation being that in the case of

ROMER, J.
1892
TUCKER
v.
VOWLES.

the few plots having an entrance or roadway at the back, as shewn upon the plan, the restrictive covenants permitted the erection of stabling in the rear of the houses to be built thereon.

W. Vowles occupied the house upon plot 6; and in May, 1891, he commenced to build upon the adjoining plots 7, 8, 9, and part of 10, acquired by him as aforesaid, the following buildings, which he intended to use as adjuncts to the house upon plot 6—that is to say, (1.) a billiard-room about twenty feet high; (2.) a conservatory about seventeen feet high; (3.) a stable and coach-house upwards of seventeen feet high; (4.) a boundary wall, in front of all his plots, about seven feet high.

C. H. Tucker complained that these buildings were a breach of the building restrictions by which he was bound, and which he alleged governed the whole estate; and on the 17th of August, 1891, when the exterior of the buildings complained of was nearly, but not quite, finished, he brought this action against *W. Vowles* claiming to have them removed. A motion for an interim injunction was heard by the Vacation Judge on the 2nd of September, 1891, and was directed by him to stand over until the trial of the action. Subsequently *Herridge* was added as a co-Plaintiff.

The Plaintiffs alleged that the whole estate was governed by restrictions substantially the same as those by which they themselves were bound, and they called evidence to prove that, during negotiations for grants, representations to that effect were made to them and other grantees by the grantors. His Lordship, however, came to the conclusion that the Plaintiffs had made no inquiries, and that the grantors had made no representation respecting the existence of any such building scheme as that alleged by the Plaintiffs. With respect to the printed form, evidence was given on behalf of the Defendant that it was prepared by the grantors' solicitor, from an old form in the office, for his own convenience in dealing with the estate, and without any definite instructions from the grantors.

Chadwyck Healey, Q.C., and *Seddon*, for the Plaintiffs:—

It being admitted that there was some scheme or intention to develop the property as a residential estate, the particulars of

such scheme must be gathered from what is shewn on the plan produced to intending grantees, and from the printed form of agreement which they were required to sign. In the case of every plot but one—an exception which proves the rule—the plan indicates a single residence, and no building. The effect of the evidence is that when the plan was produced to intending grantees, it was represented that it indicated substantially the buildings to be erected on the estate. That representation, and the exhibition of the plan in the solicitor's office, the general use of the printed form, and the fact that the restrictions therein were imposed on grantees generally, amount to a representation that such restrictions were to govern the whole estate and be binding on the purchaser of each lot. Any one who has acquired one of several lots laid out for sale as building plots—where the intention is that each purchaser shall be bound by, and, as against the others, have the benefit of the covenants entered into by each purchaser—is entitled to the benefit of the covenants: *Renals* v. *Cowlishaw* (1). It is immaterial that there is no covenant by the persons who were vendors, if the estate is sold subject to a condition that each purchaser is to enter into restrictive covenants with the vendor, and the vendor is intending to sell all the property: *Nottingham Patent Brick and Tile Company* v. *Butler* (2). The Plaintiffs' case is not weakened by the fact that what was to be a common obligation was not embodied in conditions of sale at an auction: *Spicer* v. *Martin* (3). An implied agreement by the vendors with every purchaser that none of the lots shall be built upon in a manner inconsistent with the building scheme, may be collected from the transaction of sale and purchase in the absence of express covenant: *Mackenzie* v. *Childers* (4).

If the right to a mandatory injunction has been lost by the Plaintiffs' delay, they are entitled to damages, and to a declaration that the buildings complained of are a breach of the restrictions governing the estate: *Bowes* v. *Law* (5).

[They also referred to *Collins* v. *Castle* (6).]

(1) 9 Ch. D. 125; 11 Ch. D. 866.
(2) 15 Q. B. D. 261; 16 Q. B. D. 778.
(3) 14 App. Cas. 12.
(4) 43 Ch. D. 265.
(5) Law Rep. 9 Eq. 636.
(6) 36 Ch. D. 243.

ROMER, J.

1892

TUCKER v. VOWLES.

Neville, Q.C., and *Waggett*, for the Defendant:—

The plan and printed form of agreement were not prepared under or with reference to any building scheme, and their existence and use are otherwise accounted for. The plan was prepared solely to meet the requirements of the sanitary authority, and its subsequent use was for convenience of reference only. The printed form was taken by the grantors' solicitor from an old form in use in the office, and without instructions from the grantors. Its use was for convenience only, and alterations and additions were made in it in writing as occasion required. The agreement signed by *Herridge* himself contained material alteration and addition in writing, and this was sufficient to shew him that it was not meant to be rigidly adhered to. Neither the Defendant nor any one else has covenanted to observe, in respect of the plots upon which the buildings complained of are erected, any such restrictions as are alleged to govern the estate, and he is not bound by any restrictions except such as expressly apply to the property in question.

Chadwyck Healey, in reply.

ROMER, J.:—

In my judgment, this action must be dismissed. The Plaintiffs' case is that there was a building scheme on the estate of the vendors, *Shorland* and *Vowles*, of which Plaintiffs' properties form part, binding on each plot of the estate, and, therefore, binding on the Defendant in respect of the plots on which he has built the conservatory, stable, and high wall complained of. It is said that this scheme prevented the Defendant from building the conservatory, stable, and wall, and that the Plaintiffs are entitled to enforce it as against the Defendant.

The case divides itself into two parts: First, as to the claim in respect to the conservatory and stables, which for shortness hereafter I will refer to as the stables; and, secondly, as to the claim in respect of the high boundary wall. Now, in the first place, as to the claim in respect of the stables, I shall consider the following questions: First, was there, at the date of the purchase by

the Plaintiff *Herridge*, a building scheme regulating this estate by which each plot on it was to be bound by the restrictive covenants mentioned in clause 9 of the agreement between the vendors and *Herridge*, or by which each plot was bound to have a house erected upon it worth at least £800 and no stables? Secondly, was this scheme, if there was one, communicated to *Herridge* and to *Tucker*, or either of them, or were they led to believe in the existence of such a scheme? And, thirdly, was it the intention, in this case, that each one of the several purchasers of the different lots should be bound by, and should as against the others have the benefit of, the covenants to be entered into by each of the purchasers?

In considering whether there was, at the date of *Herridge's* purchase, such a building scheme as is insisted upon by the Plaintiffs, there is this to be said: No doubt the vendors contemplated at that time selling the estate in building lots, and I think they probably contemplated those lots being sold substantially according to the plan which they had deposited with the sanitary authority. I think, speaking generally, that the vendors contemplated that the houses to be erected on the estate should be of a good class and of a residential character, and probably that, so far as the houses were concerned—again speaking generally—they should be of not less than £800 value each. And I think it may fairly also be said, as against the vendors, that they contemplated that, as to many of the lots, there should be some more or less restrictive covenants, and probably in many cases covenants like that contained in clause 9. But beyond this I do not think there ever was, at the date I am considering or at any time, a definite building scheme formed by the vendors. In particular, I do not think, on the evidence before me, that there ever was a definite scheme come to by the vendors that each lot should be subject to the restrictive covenants mentioned in clause 9, or that each lot should of necessity have a house upon it, or that every house which was erected should of necessity be worth at least £800, or that no stables should be erected on any plot. As to the restrictive covenants mentioned in clause 9 in particular, I can find no sufficient evidence to convince me of the existence of such a scheme as is suggested. It is true that

ROMER, J. 1892 TUCKER v. VOWLES.

in many, if not all, of the conveyances subsequently made of the different plots, there is contained a restrictive covenant similar, or somewhat similar, to the restrictive covenants mentioned in clause 9; but in several of the conveyances it is clear that the restrictive covenants in clause 9 were not adhered to strictly, but rather departed from; for instance, stables were allowed to be erected on several of the plots.

In favour of the Plaintiffs, on the evidence before me, I cannot gather more than this—that, without fixing themselves to any definite binding scheme, the vendors may be taken to have contemplated, in many or all of the cases when they sold the different plots, that they would take from the purchasers some such covenants as are mentioned in clause 9, or the covenants therein mentioned. But this is not a case of sale by public auction, or where the plots are put up together as a whole, or offered simultaneously to the public. There were no printed conditions, and no conditions of any kind were circulated amongst the public, or amongst the subsequent purchasers of the different lots, which were held out or treated as applicable to the whole estate. There were no representations of any kind on the part of the vendors to any purchaser, so far as the evidence is before me, that the estate, or the plots marked out on the plan, was, or were to be, bound by any conditions. No doubt a printed form of agreement was prepared. That, as a matter of fact, was not prepared by the direction of the vendors, or for their purposes at all; and, though this consideration may not be of importance in considering what the Plaintiffs may have concluded from the circumstances in which they bought, yet it is not to be disregarded in considering whether the vendors themselves did definitely come to and arrange such a building scheme as is suggested. The printed form of agreement was prepared by the solicitor from an old form he had by him, merely to save him trouble in preparing, from time to time, the agreements which he thought, and no doubt thought rightly, would from time to time be come to between the vendors and the purchasers of different lots. The solicitor clearly contemplated that each draft, each printed form, when utilised, would be altered according to the terms of each contract come to, and, no doubt, in the

hope that in the majority of cases the greater part of the print might be found useful. A plan was prepared first and chiefly for the purpose of being submitted to the sanitary authority in order to obtain their consent to the estate being laid out as a building estate in accordance with the design appearing on the plan so deposited; and the solicitor had, for his own purposes, hanging up in his office, a smaller portion of that plan—that is to say, a portion shewing simply the estate, and into what plots it was proposed at that time to divide it, and indicating, generally speaking, that it was contemplated houses should be erected on each plot except one. But, from these facts and from the other circumstances of the case, I do not think I ought to gather or conclude, and in fact I do not gather or conclude, that any such definite scheme as is urged by the Plaintiffs was ever come to by the vendors. No doubt the vendors contemplated the estate being a residential one, and that substantially the plan of the estate which I have referred to should be worked out; but I do not think I ought to gather, as against the vendors, from the facts before me, that they must be taken to have contemplated that they would never in any respect change this plan, but would rigidly adhere to it exactly as drawn; or that they were bound by a definite arrangement that each plot should have one house, and nothing but a house, except possibly a greenhouse or conservatory. And I think, in dealing with this matter, that it is not wholly to be disregarded that, when the vendors came to deal with individual purchasers like the Plaintiff *Herridge*, the plan upon the agreements between them did not shew the whole estate or all the plots, and did not, on the few plots shewn, which were only those immediately surrounding the plot sold, shew any house at all. But, whatever the effect of this may be, the evidence has satisfied me that the vendors did not contemplate that they should be so rigidly bound by the plan or by the printed form of agreement as is suggested.

Nor do the representations that were in fact made to *Herridge* assist the Plaintiffs. The only representations made were to this effect: first, that the houses on the estate should be of a good class and worth £800 each; and, secondly, that stables would be allowed on certain plots. I understand the first representation

ROMER, J. 1892 TUCKER v. VOWLES.

to have been a statement by Mr. *Shorland* of the vendors' intention as to what the general class of houses on the estate should be. I think it was not given or taken as a binding statement that each plot should of necessity have a house upon it and no stables, and still less as a representation that each plot would of necessity be governed by a covenant or contract to the effect that the house erected upon it should be of a fixed value; and certainly there was no direct representation to the effect that each lot should in fact have a house built upon it. Nor is there any evidence before me on which I can fairly come to the conclusion, as against the vendors, that there was any definite binding scheme come to by them that each plot should have no stables erected upon it—on the contrary, I am satisfied by the evidence that no such scheme was come to or arranged, though I agree so far in favour of the Plaintiffs' contention that it probably was contemplated that many plots should not have stables erected upon them. On this part of the case, *Shorland's* evidence is clear that he stated to *Herridge*, when *Herridge* was negotiating as to what plots he should buy, that he might have stables on certain plots marked on the plan which were particularly pointed out. This fact has been ingeniously used by Plaintiffs' counsel to shew that there was a definite scheme come to that the plots should not have stables upon them, except those plots which were particularly pointed out to *Herridge* as being plots on which stables might be erected. Well, I think that is not a fair inference from what passed between *Shorland* and *Herridge*. I think all that was meant was, that the vendors then contemplated that the lots which were then being specially discussed between the parties should not have stables on them, and that the other lots which were specially referred to should have; but it clearly shews that there was not any binding scheme come to that each plot should have a house and no stables.

I turn now to the next question I have to consider: Was there any communication to *Herridge* or to *Tucker* as to the existence of any such building scheme as I am considering, or were they led to believe in the existence of such a building scheme? I think not. It is not pretended that any actual representation was made that any such scheme existed. What

representations were made I have before indicated. [His Lordship commented on the evidence, and continued:—]

The question I have now to consider is: Were the Plaintiffs, or was either of them, entitled from such representations as were made, and which I have indicated, coupled with the fact that a plan such as I have indicated was seen by them, or at any rate by *Herridge*, and coupled with the fact that the body of the agreement which *Herridge* signed was printed, to assume, or to believe in, the existence of any such definite building scheme as is suggested? I think not. I do not believe in fact on the evidence that either *Herridge* or *Tucker* ever had any definite belief at the time in the existence of any such building scheme, and by the term "building scheme" it must be borne in mind what I am referring to—not any such general idea or arrangement as I have above indicated, but a definite building scheme to this effect: that each plot should be governed by restrictive contracts or covenants such as would entitle the Plaintiffs to relief in this action. The Plaintiffs' case depends substantially, if not entirely, upon the plan and the form of the agreement come to. As to the plan it had no condition or statement upon it as to what it was intended to represent. No inquiry of any kind was made by the Plaintiffs, or either of them, as to the plan, or as to whether there was going to be any scheme, or in particular as to whether any of the plots were to be subjected to restrictive covenants. With regard to the agreement being printed, no inquiry was made whether it was intended to be a common form, or generally used, or used with or without variations. No representation of any kind was made by, or on behalf of, the vendors with respect to this printed agreement; and *Herridge*, when he signed the agreement, saw in his own case that the printed form, in many respects, was altered to suit the circumstances of his own special contract. Moreover, he knew from what *Shorland* had told him that, at any rate as to some plots, it was contemplated erecting stables upon them, and that, therefore, the printed conditions of No. 9 could not be meant to be generally applicable to the whole estate.

Lastly, in considering the third question, I think it is sufficient for me to say this: that on the evidence I am satisfied that

ROMER, J. 1892 TUCKER v. VOWLES.

it was not the intention that each one of the several purchasers of these lots should be bound by, or should, as against the others, have the benefit of, the covenants into which *Herridge* entered by his agreement or any such similar covenants.

The above remarks apply even with greater force to that part of the case which concerns the boundary wall. In my opinion, there is no ground for assuming that there was to be a covenant or a contract, binding on the purchaser of each lot, that his front boundary wall should not exceed 2 ft. 6 in. high. There was no representation to that effect made to the Plaintiffs. In the Plaintiff *Herridge's* own agreement, the provision with regard to the boundary walls was not, as a matter of fact, in print at all, but was in ink. And if, in support of the contention that there was some definite scheme as to front boundary walls, reliance is placed on the fact that when you look at subsequent transactions the front boundary walls generally are only 2 ft. 6 in. in height, then it is to be observed that in many cases the front boundary wall exceeds 2 ft. 6 in. And to say that those cases where the front boundary wall exceeds 2 ft. 6 in. are cases where the plots on which they are do not front other plots on the estate, does not in my opinion detract in any way from the force of the observation that I have made with reference to it, for it shews that in those cases the vendors evidently thought that, where proper reasons applied, they did not contemplate, and were not bound to adhere to, any rule as to the height of the front boundary wall.

No case has been cited at all like the present one. To decide in favour of the Plaintiffs in this case, it appears to me, would substantially amount to a decision of the following kind—that if a vendor prepares a plan of a building estate shewing plots with houses marked on them, and a purchaser is shewn that plan, or sees it, and then his agreement with regard to a plot purchased by him happens to be on a printed form with alterations, the purchaser is entitled to assume without anything more and without any inquiry that the whole estate is governed by a building scheme that each plot shall be definitely and without variation built upon strictly in accordance with the indications on the plan, and, moreover, that each plot shall be governed of necessity by the printed portions of his agreement. I think that to come to

such a conclusion as that would be unjust, and that the reasons which have governed the Court when deciding in favour of plaintiffs in cases somewhat analogous to this do not apply here.

I think this case fails for the reasons I have given, and the action must be dismissed with costs.

Solicitors for the Plaintiffs: *Ley, Lake, & Ley*, agents for *J. B. C. Burroughs, Bristol.*

Solicitors for the Defendant: *Guscotte, Wadham, & Daw*, agents for *Lawrence & Williams, Bristol.*

F. E.

VAUGHAN WILLIAMS, J.

1892
Nov. 9.

In re LAXON & CO. (3).

[0030 of 1892.]

Company—Winding-up—Public Examination—Report of Official Receiver—Statement or Suggestion of Fraud—Companies (Winding-up) Act, 1890 (53 & 54 *Vict. c.* 63), *s.* 8.

The further report of the Official Receiver, under sect. 8, sub-sect. 2, of the *Companies* (*Winding-up*) *Act*, 1890, in support of an application for public examination, need not in terms state that, in his opinion, fraud has been committed in the promotion or formation of the company or the conduct of its business. It is sufficient if the further report state facts which suggest the existence of such fraud.

In re Trust and Investment Corporation of South Africa (1); and *In re Bertram Luipaard's Vlei Gold Mining Company* (2) explained.

AN order for winding up a company called "*W. Laxon and Company, Limited*," was made by the High Court of Justice on the 27th of June, 1892.

On the 12th of August, 1892, the Official Receiver made his preliminary report, under sect. 8 of the *Companies* (*Winding-up*) *Act*, 1892; but this report did not allege fraud or state any facts suggestive of fraud.

On the 23rd of August, 1892, the Official Receiver made his further report, under sub-sect. 2 of sect. 8, which report, so far as material, was as follows:—

"(9.) The business purchased was an old-established one; but if the bank overdraft—£4345 15*s.* 3*d.*—had been included among the liabilities, it was insolvent at the time of the negotiations for sale. An arrangement was, however, made by which this item was to be omitted, and, in consideration of the bank agreeing to the proposed transfer, *Charles Laxon*, who was to receive debentures to the nominal value of £1500, as the vendors' nominee, undertook to guarantee the bank to a similar amount. (10.) *William Laxon* admits that the whole of the liabilities of the business were paid by the company, and that they exceeded by about £300 (the amount of one week's purchase) the amount entered as owing, but stated that this omission was accidental.

(1) [1892] 3 Ch. 332. (2) [1892] 3 Ch. 332.

. . . . (12.) It is stated that entries have been made in the books of the company in order to conceal its true position, and that moneys have been improperly drawn by one of the directors."

On the 14th of September, 1892, the Official Receiver issued an *ex parte* summons, asking that a day might be appointed for considering his further report, and that the persons whose names were scheduled to the summons might be directed to attend for public examination.

The Official Receiver appeared in person in support of this application, on the 1st of November, 1892, when Mr. Justice *Vaughan Williams* reserved judgment.

1892. Nov. 9. VAUGHAN WILLIAMS, J.:—

This is an application for an order for examination under sect. 8 of the *Companies* (*Winding-up*) *Act*, 1890. The Court of Appeal decided in *In re Trust and Investment Corporation of South Africa* (1), and in *In re Bertram Luipaard's Vlei Gold Mining Company* (2) that the decision in *Ex parte Barnard* (3) did not mean that the Official Receiver must, in order to obtain an order under sect. 8, sub-sect. 3, state in his report that some fraud had been committed by the person to be examined, but only that a report that some fraud has been committed was necessary, and that it was further necessary that the Official Receiver should make a report that *X. Y. Z.*, or whoever the people in his schedule might be, were persons who filled the characters enumerated in clause 3—that is to say, persons having taken part in the promotion or formation of the company, or having been directors or officers of the company. Lord Justice *Lindley* says (4): "In each of these cases we have two reports which are plain enough, not only a report under sub-sect. 1, that further inquiry is desirable as to the promotion, formation, or failure of the company, or the conduct of the business thereof, for these companies appear to be simply swindles, but a further report under sub-sect. 2 which shews that, in the opinion of the liquidator, frauds have been committed by persons in the promotion

(1) [1892] 3 Ch. 332.
(2) Ibid. 332.
(3) [1892] 3 Ch. 307.
(4) Ibid. 343.

VAUGHAN WILLIAMS, J.

1892

In re LAXON & Co. (3).

or formation of the company." Then Lord Justice *Lopes* says (1): "There must be a report that in the opinion of the Official Receiver a fraud has been committed by somebody, but that the particular person or persons who were parties to it need not be named in order to apply this sub-section." Lord Justice *A. L. Smith* says, that in his judgment, there must be a report of the Official Receiver "shewing that, in his opinion, a fraud has been committed by some person or persons who has or have taken part in the promotion of the company, or has or have been a director or officer of the company; and that the person to be examined comes within the category of a person who has taken part in the promotion or formation of the company, or has been a director or officer of the company." It will be observed that in those cases the Official Receiver did not by his report say in so many words that in his opinion any fraud had been committed, but the Court of Appeal nevertheless made the order. I infer from this that the Court of Appeal did not mean that the Official Receiver need, in his report, say in terms that in his opinion fraud had been committed by persons in the promotion or formation of the company; but that it is sufficient if the facts mentioned in the report suggest fraud by some person or persons who have taken part in the promotion of the company, or have been directors of the company, and that the persons to be examined come within the category of persons who have taken part in the promotion or formation of the company, or have been directors or officers of the company. Now, I have to see whether these two conditions have been complied with in the present case. There is no statement in the report that, in the opinion of the Official Receiver, fraud has been committed in the promotion or formation of the company, or as to the conduct of the business of the company; but there is a statement of facts which is suggestive that some fraud may have been committed, and, as the object of the section manifestly is to find out whether such fraud as the facts suggest has been committed, I think that I ought to make the order asked for. I will now deal with the reports in the present case—the first report and the final report. In the first report, of the 12th of August, 1892,

(1) [1892] 3 Ch. 344.

not only is there no statement that fraud has been committed in the opinion of the Official Receiver, but there is no statement of facts suggestive even of such fraud. Of the second report, of the 23rd of August, for the most part the same may be said, but paragraphs 9, 10, and 12 are as follows. [His Lordship read these paragraphs, and concluded as follows:—]

As I understand the judgment of the Court of Appeal, when it is stated that the report must shew that fraud has been committed in the promotion or formation of the company, or, I presume, in the conduct of the business of the company, it is not meant that the report must state in terms that fraud has, in the opinion of the Official Receiver, been committed, but only that the facts which suggest fraud must be stated. It was not intended to say that the Official Receiver must state the fact of fraud, the existence of which it is one object of the examination to ascertain.

Official Receiver in Person.

F. E.

C. A.
1892
Nov. 3.

In re CLOWES.

[1892 C. 7203.]

Will—Ademption—Specific devise—Subsequent sale of Property and Re-conveyance to Testator by way of Mortgage—Wills Act (1 *Vict. c.* 26), *ss.* 23, 24 [*Revised Ed. Statutes, vol. viii., p.* 34]—*Conveyancing and Law of Property Act*, 1881 (44 & 45 *Vict. c.* 41), *s.* 30.

A testator, being absolutely entitled to a freehold estate, specifically devised it to *H.* Afterwards he sold the estate to a purchaser, and on the following day the property was reconveyed to him by way of mortgage for securing part of the purchase-money, which was allowed to remain charged on the estate :—

Held (reversing the decision of the Vice-Chancellor of the County Palatine of *Lancaster*), that the sum secured by the mortgage did not pass to the specific devisee.

Woodhouse v. *Meredith* (1) distinguished.

THIS was an appeal from a decision of the Vice-Chancellor of the County Palatine of *Lancaster*.

Thomas Clowes, by his will dated the 24th of September, 1878, among other specific and pecuniary gifts devised all those two dwelling-houses and the vacant land adjoining, situate at *Llandrillo*, in *North Wales*, recently bought by him from *B. Sugden*, to *James Hudson* and *Edward Hudson*, as joint tenants. And the testator gave all the residue of his real and personal estate to trustees, whom he also appointed his executors, upon trust to sell the same, and to pay his debts, legacies, and testamentary expenses, and to stand possessed of the residue upon the trusts in his will mentioned.

The testator made a codicil to his will, dated the 7th of April, 1883, in which he revoked the devise to *James Hudson* and *Edward Hudson* of the said two dwelling-houses, and devised the same, and also the cottage adjoining thereto and the garden walled round, bought by him from *John L. P. Evans*, to the said *James Hudson* absolutely.

By an indenture dated the 11th of July, 1888, the testator, in consideration of £1220, absolutely conveyed the said cottages

(1) 1 Mer. 450.

and garden, comprised in the devise to *James Hudson*, to *H. B. Hill* in fee; and by an indenture dated the following day, *H. B. Hill* conveyed the same premises to the testator in fee by way of mortgage for securing the payment of £900, part of the purchase-money, which was allowed to remain charged on the property.

The testator died on the 6th of October, 1889, and his will and codicil were duly proved by the executors named therein. The testator never entered into possession of the devised premises as mortgagee. The mortgage debt was paid off to his executors shortly after his death, and the mortgaged property was reconveyed to *H. B. Hill*.

A summons having been taken out for the administration of the testator's estate, *J. Hudson* claimed that as at the time of the death of the testator his only interest in the premises comprised in the devise was as mortgagee, the benefit of such mortgage passed to *J. Hudson* under the devise, and that the sum of £900 thereby secured belonged to him.

The Vice-Chancellor held that *J. Hudson* was entitled to the sum claimed, and the residuary legatee, *W. C. Walwyn*, appealed from this decision.

Hopkinson, Q.C., and *Bather*, for the Appellant:—

The testator had at his death parted with all his interest as owner in the property devised by the codicil. The mortgagor is the owner of the estate, not the mortgagee. If the testator had made the devise immediately before his death, so that no question under the 23rd and 24th sections of the *Wills Act* could have arisen, and if the *Conveyancing Act*, 1881, had not passed, nothing would have passed to the devisee except the legal estate, and of that the devisee would have been trustee for the person entitled to the money: *Moor* v. *Raisbeck* (1). The 23rd and 24th sections of the *Wills Act* do not put him in a better position than this: *Bowen* v. *Barlow* (2). Under the *Conveyancing Act*, 1881, sect. 30, the devisee does not even take the legal estate, which passes to the executors.

[They were stopped by the Court.]

(1) 12 Sim. 123. (2) Law Rep. 8 Ch. 171.

C. A. 1892 *In re* CLOWES.

Farwell, Q.C., and *Astbury*, for the devisee :—

The case is governed by the 23rd and 24th sections of the *Wills Act*, and the only question is, whether the testator had any estate or interest in the property devised at the time of his death. In *Woodhouse* v. *Meredith* (1), it was held that a devise of the testator's "freehold and leasehold messuages in the town of *Kensington*" passed a leasehold house held by way of mortgage and the moneys arising from the sale thereof. That case is very similar to the present. We also rely on *Cox* v. *Bennett* (2); *Saxton* v. *Saxton* (3); *In re Russell* (4); *Airey* v. *Bower* (5). *Moor* v. *Raisbeck* (6), which was cited by the Appellant, is of doubtful authority, for it was decided on an erroneous interpretation of the words "revoked as aforesaid" in the 23rd section of the *Wills Act*. With respect to the 30th section of the *Conveyancing Act*, 1881, that is in our favour, for under it the legal estate of necessity passed to the executors; and unless the beneficial interest in the mortgage debt passed the devise was absolutely inoperative, which is a construction which the Court will not adopt if it can be avoided.

Norris, for the trustees.

Hopkinson, in reply, cited *Farrar* v. *Earl of Winterton* (7); *In re Gibson* (8); *In re Lane* (9).

LINDLEY, L.J. :—

The case is a somewhat curious and interesting one, and not quite free from difficulty; but, in my opinion, the Vice-Chancellor was mistaken in the conclusion at which he arrived. The ground on which I think so is shortly this. Money charged on land does not pass under a devise of land; and the attempt to get rid of that proposition, reading sects. 23 and 24 of the *Wills Act* and sect. 30 of the *Conveyancing Act* in a particular way, cannot I think succeed. The testator by a codicil to his will revokes

(1) 1 Mer. 450.
(2) Law Rep. 6 Eq. 422.
(3) 13 Ch. D. 359.
(4) 19 Ch. D. 432.
(5) 12 App. Cas. 263.
(6) 12 Sim. 123.
(7) 5 Beav. 1.
(8) Law Rep. 2 Eq. 669.
(9) 14 Ch. D. 856.

the devise contained in his will of two dwelling-houses at *Llandrillo*, bought from *Benjamin Sugden*, and devises the same, "and also the cottage adjoining thereto, and garden walled round, bought from *J. L. P. Evans*, to *James Hudson* absolutely." Suppose that when the testator made the codicil containing this devise he had not been, as he was, seised in fee as absolute owner, but had only been mortgagee, could any one say, leaving out for the present any question of the effect of the *Conveyancing Act*, 1881, that the mortgage-money would have passed under the devise? I should say, No; notwithstanding the case of *Woodhouse* v. *Meredith* (1), which has been relied on by the Respondent. If a testator specifically devises a particular estate, which is only a mortgage estate, and not the money charged on it, the devisee is only a trustee for the persons entitled to the money; but in the case cited the testator had subjected the estate devised to special limitations in the same way as his absolute property; and the Master of the Rolls says (2): "It is admitted that the testator had no leasehold property, either at *Kensington*, or anywhere else in the county of *Middlesex*, unless these mortgaged premises are to be so considered; and it is obvious, from the nature of the limitations and provisions in the will, that, if they at all pass, it is the absolute interest in them, and not the mere legal estate, that is to be considered as being disposed of." It would be ridiculous to say that in that case the testator was only intending to pass the legal estate. In the present case when the codicil was made the testator was absolute owner of the property. Then he sold it, and did what is very commonly done, he allowed a portion of the purchase-money to remain on mortgage of the property. What, again leaving out of sight the *Conveyancing Act*, was the effect of sects. 23 and 24 of the *Wills Act* under these circumstances? The will has to be applied to the state of things existing when the testator died. The effect of that is to make *James Hudson* the devisee of the house, but only as trustee for the persons entitled to the beneficial interest in the money secured thereon. I have no reasonable doubt that this is the effect of the clauses in the *Wills Act*. If authority is wanted, this case is covered by *Moor* v. *Raisbeck* (3), where the decision is

(1) 1 Mer. 450. (2) 1 Mer. 457. (3) 12 Sim. 123.

C. A. 1892 *In re* CLOWES. Lindley, L.J.

right, though some of the observations of the Judge as to the revocation of the will may be questionable. The same point was decided in *Farrar* v. *Earl of Winterton* (1). But it was contended that the *Conveyancing Act*, 1881, was material, and that by sect. 30 of that Act land held on mortgage as a security goes to the legal personal representative, in spite of any testamentary disposition to the contrary, and that the effect of that in the present case would be to put an absurd construction on the will; for that if the money did not pass nothing at all would pass under the devise, and it was a fundamental rule, that if possible some meaning should be given to every clause in a will. That argument might have some force if the testator had made the codicil when he was mortgagee; but that was not so, and the contention cannot prevail. The appeal must be allowed.

BOWEN and A. L. SMITH, L.JJ., concurred.

Solicitors: *Crofton & Craven, Manchester; T. C. P. Gibbons, Manchester.*

M. W.

C. A. 1892 *Nov.* 23.

LAMB *v.* EVANS.

[1892 L. 1855.]

Copyright — Directory—Headings—Advertisements — Collection of Advertisements—Employer and Agent—Copyright Act (5 & 6 *Vict. c.* 45), *s.* 18 [*Revised Ed. Statutes, vol. viii., p.* 1158].

A trades directory consisted of advertisements furnished by tradesmen classified under headings denoting the different trades, which headings were composed by the Plaintiff, the registered proprietor, or by persons paid by him to compose them; but there was no express evidence that they were composed on the terms that the copyright should belong to him:—

Held, by *Chitty*, J., that the publisher had no copyright in the advertisements, but had a copyright in the headings:

Held, by the Court of Appeal, that the Plaintiff had a copyright in the headings, and that though it was necessary under 5 & 6 Vict. c. 45, s. 18 that they should have been composed on the terms that he should have the

---

(1) 5 Beav. 1.

copyright, this condition was satisfied because the fair inference from the circumstances of the case was that they had been composed on those terms. And *semble*, that although the Plaintiff could not have copyright in a single advertisement, inasmuch as the advertiser must be at liberty to insert it elsewhere, the Plaintiff had copyright in the mass of advertisements as arranged.

Canvassers who had been employed by the proprietor under agreements which bound them to devote themselves in a particular district exclusively to obtaining from traders advertisements to be inserted in the directory, and to supply the blocks and materials necessary for producing such advertisements, proposed at the expiration of their agreements to assist a rival publication in procuring similar advertisements:—

Held (affirming the decision of *Chitty*, J.), that they were not entitled to use for the purposes of any other publication the materials which, while in the Plaintiff's employment, they had obtained for the purpose of his publication.

THIS was an appeal by the Defendants *Evans* from a decision of Mr. Justice *Chitty* (1).

The Plaintiff had for many years been the proprietor and publisher of "The International Guide to British and Foreign Merchants and Manufacturers," which had gone through several editions, and was registered at *Stationers' Hall*. It had a Continental Section, which contained a list of Continental traders who desired to advertise in this book. These advertisements, the insertion of which was generally paid for by the traders, were arranged under special headings denoting the nature of the businesses, which were placed alphabetically, as, for instance, "Absinthe," "Brush Manufacturers." Each heading was given in English, French, German, and Spanish, and under it the names of the traders who came within it were alphabetically arranged. In some cases only their names and addresses were given. In other cases more elaborate advertisements were furnished, containing descriptions of the articles in which the advertiser dealt, and representations of trade-marks and of medals gained by him at exhibitions. Each descriptive advertisement was accompanied by an English translation. The English headings were prepared by the Plaintiff himself, or by persons employed and paid by him to do it, and the translations of them were paid for by him.

(1) [1892] 3 Ch. 462.

C. A. 1892 LAMB v. EVANS.

Each of the Defendants *Evans* was employed by the Plaintiff to canvass for advertisements in a certain district on the Continent. In each case the Plaintiff agreed to employ the canvasser exclusively in that district, and the canvasser agreed to work therein for the Plaintiff exclusively. Each was remunerated by a large commission on the amount received by him for advertisements, and agreed to furnish all blocks and translations relating to his canvass free of charge. The blocks, however, were generally furnished by the advertisers, and handed over for the purpose of printing the advertisements.

The engagement of the Defendants *Evans* came to an end in April, 1892, and they entered into the service of a rival publication, the "Commercial Directory," and assisted in adding thereto a Continental Section. The Plaintiff, considering that his rights were interfered with, brought his action against the Defendants *Evans* and the proprietor and the publishers of the "Commercial Directory."

Mr. Justice *Chitty* was of opinion that the Plaintiff had copyright in the headings, but not in the advertisements, and granted an injunction until judgment or further order, restraining the *Evanses* and the proprietors of the "Commercial Directory" "from printing, selling, or publishing any copy or copies of so much of the Plaintiff's book in the writ mentioned as consists of headings (not forming part of advertisements therein), so or in such way as to infringe the Plaintiff's copyright in such headings, and from displaying or using for the purpose of obtaining advertisements for any work other than the Plaintiff's said work, so much of the copies of the Defendants' book already printed as consists of such headings aforesaid, and from using blocks or materials obtained by the Defendants *E. A. Evans* and *T. H. A. Evans*, or either of them, while in the employment of the Plaintiff, and for the purposes of his said work, or any copies thereof, for the purposes of any work other than the said work of the Plaintiff. But this order is not to extend to prevent the Defendants, or any of them, making legitimate use of the Plaintiff's work, or any part thereof, for the purpose of obtaining advertisements or otherwise."

The Defendants *Evans* appealed.

Farwell, Q.C., and *Ribton*, for the appeal:—

We say that there was no copyright at all. There cannot be any copyright in advertisements, as Mr. Justice *Chitty* held in the present case, and the headings are a mere part of the advertisements. In *Maple & Co.* v. *Junior Army and Navy Stores* (1) there was literary labour in the book as a whole, and so it formed the subject of copyright. Moreover, we say that, if the headings are the subject of copyright, the Plaintiff must fail, because he has not satisfied the requirements of 5 & 6 Vict. c. 45, s. 18. Under that section he cannot sue for piracy unless he proves that the writer has been paid for his services, and also that the articles were composed on the terms that they were to be the copyright of the employer. There must be evidence of this latter fact: *Walter* v. *Howe* (2); and here the Plaintiff has given no evidence to that effect. He, therefore, has not proved his case.

[LINDLEY, L.J., referred to the judgment of *Maule*, J., in *Sweet* v. *Benning* (3)].

We contend, therefore, that the judgment is wrong as to the headings.

Then, as to the blocks, we object to the wide injunction as to copies. The injunction would prevent the Defendants from printing from the blocks at the request of the advertisers to whom they belong.

[LINDLEY, L.J.:—That cannot have been intended. I should suggest inserting the qualification that the injunction should not prevent the publishing copies at the request, or by the direction, of the advertisers to whom they belong.]

The case of *Reuter's Telegram Company* v. *Byron* (4) is inconsistent with the order appealed from. The whole object of getting the blocks was that impressions from them might be published; so the principle of *Prince Albert* v. *Strange* (5), and *Pollard* v. *Photographic Company* (6) does not apply. The blocks were got for the purpose of the publication; so when once the book was

(1) 21 Ch. D. 369.
(2) 17 Ch. D. 709.
(3) 16 C. B. 459, 484.
(4) 43 L. J. (Ch.) 661.
(5) 2 De G. & Sm. 652; 1 Mac. & G. 25.
(6) 40 Ch. D. 345.

C. A. 1892 LAMB v. EVANS.

published the object was attained, and there was no further restraint in the use of them.

[KAY, L.J.:—Is not the principle here that you are doing something inconsistent with the duties of your employment?]

There is no such abuse of confidence here as in *Morris* v. *Ashbee* (1), explained in *Morris* v. *Wright* (2), or in *Merryweather* v. *Moore* (3). The case is more like that put in the latter judgment, of a conveyancer's pupil copying and making use of his tutor's precedents.

Byrne, Q.C., and *Morshead*, for the Plaintiff, were not called upon.

LINDLEY, L.J.:—

This is an appeal from an injunction granted by Mr. Justice *Chitty*, restraining the Defendants, two of whom, the Defendants *Evans*, had been agents of the Plaintiff, from printing and selling certain portions of a book to which I will refer hereafter, and from using some blocks and materials obtained by the Defendants *Evans* during their agency. The Plaintiff is the owner and is the registered proprietor of the copyright in a book which is called "*Lamb's* International Guide to Merchants and Manufacturers." He employed two gentlemen of the name of *Evans* to canvass for him abroad, to obtain from merchants and manufacturers and traders orders for the insertion of their names and addresses, and the short description of what they make or trade in, with the addition, if they liked, of illustrations by means of wood blocks or electrotype blocks. The Defendants *Evans* were appointed by Mr. *Lamb* his exclusive agents for the purpose of obtaining such orders in certain places in *Europe*, situate in nearly every country on the Continent; and provision was made for their payment out of the moneys paid by the advertisers. The general result was that the agents got from 60 to 65 per cent., and the Plaintiff got the difference. Now, it appears that the agreements between the Plaintiff and the Defendants either have come to an end, or are about to come to an end, and the

(1) Law Rep. 7 Eq. 34. (2) Law Rep. 5 Ch. 279.
(3) [1892] 2 Ch. 518.

Defendants propose to do the same sort of thing for a rival publication. There is no clause in the agreement between the Plaintiff and the Defendants which entitles the Plaintiff to say that the Defendants *Evans*, after leaving his employment, should not engage in a similar kind of business.

But the Plaintiff relies, first of all, for protection upon his copyright in the book; and, secondly, as regards the use of the blocks and materials, upon principles, not of copyright, but of agency. The first point is on the copyright. Mr. Justice *Chitty* has granted an injunction restraining the Defendants, until judgment or further order, from printing, selling, or publishing any copy or copies of so much of the Plaintiff's book in the writ mentioned, as consists of headings (not forming part of advertisements therein), so or in such a way as to infringe the Plaintiff's copyright in the headings. The Appellants contend that this part of the order is wrong, upon the ground that the Plaintiff has no copyright in the headings; and they put their case in this way—that the headings are not a subject-matter of copyright; and that if they were, there is no proof, such as is required by the 18th section of the *Copyright Act* (5 & 6 Vict. c. 45), that the parts of the work which Mr. Justice *Chitty* has protected were composed upon the terms that the copyright in them should belong to the Plaintiff. As regards copyright, I rather think that Mr. Justice *Chitty* has not gone quite far enough. I do not myself see the difficulty in a publisher's having a copyright in a sheet of advertisements. I do see a difficulty in his having a copyright in one advertisement, because, as Mr. Justice *Chitty* pointed out, that might prevent the advertiser from republishing his advertisement in another paper, which is absurd. But to say that it follows from that, that the proprietor, say of the *Times*, has no copyright in a sheet of advertisements, so that he cannot restrain anybody from copying that sheet, appears to me a very different proposition. It is not necessary for me to decide it, and I do not decide it, as the Plaintiff does not ask for an injunction larger than Mr. Justice *Chitty* has granted; but I doubt very much whether he has not been a little too cautious. A person has a copyright in a book though he has not a copyright in every part of it; for he cannot restrain other people from using

C. A. 1892 LAMB v. EVANS. Lindley, L.J.

words to be found in his book. It appears to me that the learned Judge has overlooked the difference between the right to publish a whole sheet of the paper and the right to publish a sentence out of the sheet.

As regards, however, the particular portions which Mr. Justice *Chitty* has protected—the headings—I do not think there is any real difficulty. It appears to me that the Plaintiff has an exclusive right to the publication of those headings with the translations—not that he can restrain other people from publishing the same sort of thing if they go about it in the right way, but he has a right to restrain other people from copying his book. There is so much common to his book and to other books of the same sort that they very likely will contain the same information. It is just like the case of a man who publishes a map of a particular country: another may publish a map of the same country exactly like it, if he makes his map from original materials; but the first can restrain the other from copying his map, which is a totally different thing. I see no difficulty in that part of the case apart from the argument which turns on the wording of 5 & 6 Vict. c. 45, s. 18, which enacts that when any person shall project, conduct, and carry on, or be the proprietor of any encyclopædia, review, magazine, periodical work, or any book, "and shall have employed or shall employ any persons to compose the same, or any volumes, parts, essays, articles, or portions thereof, for publication in or as part of the same, and such work, volumes, parts, essays, articles, or portions shall have been or shall hereafter be composed under such employment, on the terms that the copyright therein shall belong to such proprietor, projector, publisher, or conductor, and paid for by such proprietor, projector, publisher, or conductor, the copyright in every such encyclopædia . . . . and in every volume, part, essay, article, and portion so composed and paid for, shall be the property of such proprietor. . . ." Then there are in the section various other provisions into which I need not enter. Mr. *Farwell* contends that the Plaintiff has not obtained the copyright in these headings because he has not shewn that they were composed upon the terms that the copyright therein should belong to the Plaintiff. I think his argument is right,

that the burthen of proof is upon the Plaintiff to shew that; but the statute does not say anything about the kind of evidence which is to be adduced for the purpose of proving that an article has been composed on those terms. If there is an express agreement on the subject, we have nothing to do but to construe its terms. If there is no express agreement, the question is, what is the inference to be drawn from the circumstances of the case? In drawing the inference regard must be had to the nature of the articles, which are here merely the headings to groups of advertisements with translations, and the view expressed by Mr. Justice *Maule* in *Sweet* v. *Benning* (1), may be very safely acted upon, viz., that *primâ facie*, at all events, you will infer, in the absence of evidence to the contrary, from the fact of employment and payment that one of the terms was that the copyright should belong to the employer. That is not a necessary inference; but in a case of this sort, where any other inference would be unbusiness-like, I should not hesitate myself to draw that inference. Having regard to the employment and payment and the kind of work which one party was doing for the other, I draw the inference of fact that the work was done upon the terms that the copyright in these headings, which are of no use to anybody but the Plaintiff, should be his. Therefore, so far as the copyright is concerned, it seems to me that Mr. Justice *Chitty* is perfectly right.

The other point is the injunction restraining the Defendants from using blocks or materials obtained by the Defendants while in the employment of the Plaintiff, and for the purpose of his work, or any copies thereof, for the purpose of any works other than the work of the Plaintiff. There was some little controversy as to the extent of this injunction, and it was pointed out that the expression "or any copies thereof" went too far, because those words unqualified would cover the case—which nobody thought of covering—of the advertiser getting back his block from the Plaintiff (the block belonging to the advertiser), and then applying to the Defendants to print it, which, of course, the advertiser would have a perfect right to do. Mr. *Byrne* does not object to the qualification which I suggested in the course

(1) 16 C. B. 484.

C. A. 1892 LAMB v. EVANS. Lindley, L.J.

of the argument, that this order is not to prevent the Defendants or any of them from publishing any copy of any block at the request or by the direction of the owner thereof, and that qualification will be added.

That leaves only one point for consideration, and that is that part of the injunction which restrains the Defendants from using the blocks or materials mentioned in the order. Mr. *Farwell* has endeavoured to shew that the injunction goes too far as regards materials; but the whole is qualified both as to blocks and materials by this, that they are obtained by the Defendants while in the employment of the Plaintiff and for the purpose of his work. That suggests this question—which has nothing to do with copyright—What right has any agent to use materials obtained by him in the course of his employment and for his employer against the interest of that employer? I am not aware that he has any such right. Such a use is contrary to the relation which exists between principal and agent. It is contrary to the good faith of the employment, and good faith underlies the whole of an agent's obligations to his principal. No case, unless it be the one which I will notice presently, can I believe be found which is contrary to the general principle upon which this injunction is framed, viz., that an agent has no right to employ as against his principal materials which that agent has obtained only for his principal and in the course of his agency. They are the property of the principal. The principal has, in my judgment, such an interest in them as entitles him to restrain the agent from the use of them except for the purpose for which they were got. It is said that *Reuter's Telegram Company* v. *Byron* (1), before Sir *G. Jessel*, is opposed to this. If that case went on the ground that the Master of the Rolls was not satisfied that the case was plain enough for him to grant an interlocutory injunction, there is nothing more to be said about it; but, if the decision goes further than that, I think that undoubtedly the principle was applied there more narrowly than it ought to have been. In the present case I see no reason for objecting to this part of the injunction; and, therefore, with the addition of the words by which I have proposed to qualify the words "or copies

(1) 43 L. J. (Ch.) 661.

thereof," the appeal will be dismissed, and it must be dismissed with costs.

BOWEN, L.J.:—

I am of the same opinion. First, with regard to the headings. That they are the subject of copyright I do not think can be disputed. They are the result of literary labour, both as regards the composition of the headings themselves and their collocation or concatenation in the book. If they are the subject of copyright, in whom is the copyright? For the purpose of answering that question we have to look at sect. 18 of the Act of 1842. They were composed by persons who were employed to compose them and paid to compose them by the Plaintiff. They are parts of a book; and the question which has been argued before us by Mr. *Farwell* was, that the Plaintiff was not entitled to the copyright because the persons who composed them were not shewn to have composed them on the terms that the copyright should belong to the Plaintiff. To my mind, as between the Plaintiff and the Defendants *Evans*, that point might easily be disposed of by saying that in the agreement, between them and the Plaintiff *primâ facie* evidence is afforded that the book, and therefore the parts of the book, belong to the Plaintiff, by which, as a matter of business, one would understand that with regard to those parts which were susceptible of copyright, the copyright as between the Defendants *Evans* and the Plaintiff must be taken to belong to the Plaintiff. But quite apart from the evidence *inter partes*, which is in the nature of admission, it seems to me that the same result follows from an intelligent consideration of the way in which these headings came into existence. Did they come into existence on the terms that the copyright should belong to the proprietor? It is clear law that the terms which are necessary as a condition precedent to the vesting of the copyright under this section of the Act need not be terms put into writing. It is equally clear law that they need not be terms that are expressed: they are terms which may be either expressed or which may be gathered from the transactions, and for that, if it is necessary, *Sweet* v. *Benning* (1) would be a

(1) 16 C. B. 459, 484.

C. A. 1892 LAMB v. EVANS. Bowen, L.J.

sufficient authority; but it cannot, I apprehend, be doubted that this would be the true interpretation of the section, apart from authority. From what are you to collect the terms? You may collect them from what passed between the parties—that is to say, between the Plaintiff and the persons whom he employed; but you may also collect them from the nature of the business itself, and it seems to me to be impossible, as a matter of business to suppose that these headings were composed and furnished to the Plaintiff upon any other terms than that he was to have the copyright in them, because otherwise those who composed them, having furnished them to the Plaintiff, might themselves have published them and defeated his object. It appears to me, therefore, that the headings are matters in which copyright can exist, and that the Plaintiff is entitled to copyright in them.

With regard to the prints and illustrations, it is equally clear law that the prints—I am not talking of separate prints, but prints which are part and parcel of the book—are covered by the law of copyright, and I should have thought that the prints in this book, as distinct from the prints separate from the book (which are a totally different thing), were the subject of copyright, and I should have said, in the same way, that in this book they are the copyright of the Plaintiff. With regard to the advertisements, though it is not necessary to decide that, I am by no means satisfied that Mr. Justice *Chitty* did not, as my Brother the Lord Justice has said, take on this interlocutory motion rather a narrower view of the law of copyright as applicable to those advertisements than probably he would take at the trial. It is perfectly true that each separate advertisement may not have become in its separate form, and as a distinct entity, the copyright of the Plaintiff; but he still might have a copyright in respect of the collocation and concatenation of the advertisements, just as, I believe, the proprietors of the *Times* would have copyright in a sheet of advertisements. Although they would not have a right of preventing any person who furnished them with an advertisement from inserting it in some other paper, because from the nature of the case it would be obvious that they did not receive the advertisement upon the terms that they should have the copyright, yet, nevertheless, they would, I think, have

a right of action against any other paper that took a whole sheet of advertisements as arranged appearing in the *Times*, or a substantial part of it with the advertisements, and reprinted and republished it. But it is not necessary to decide that point, as the Plaintiff is not asking to have the order made more extensive.

Then we come to the second part of the case. Has not the Plaintiff a right to restrain the Defendants from using such blocks and materials or copies as they obtained while they were in the employment of the Plaintiff and for the purposes of their service and of the work which they had to do, that is to say, which they obtained for the purpose of doing their duty to the Plaintiff? Ought not the Plaintiff to be able to restrain them from afterwards using those materials and those documents in competition with the Plaintiff himself? It is not a question of copyright—that must be kept out of sight altogether—nor is it, on the other hand, a simple question of the absolute property at law in the documents themselves or in the blocks themselves. It is a question of whether the Plaintiff, whatever the property in the documents may be, or whatever the property in the materials may be, has not sufficient special property in them to entitle him to restrain the use of them against him when they had been obtained for his use by his agents in the course of their employment. That depends entirely, I think, upon the terms upon which the employment was constituted through which the fiduciary relation of principal and agent came into existence. I think my Brothers have already during the course of the argument expressed what I fully believe, that there is no distinction between law and equity as regards the law of principal and agent. The common law, it is true, treats the matter from the point of view of an implied contract, and assumes that there is a promise to do that which is part of the bargain, or which can be fairly implied as part of the good faith which is necessary to make the bargain effectual. What is an implied contract or an implied promise in law? It is that promise which the law implies and authorizes us to infer in order to give the transaction that effect which the parties must have intended it to have and without which it would be futile. Take this business as a business of an ordinary kind—for I agree that in different businesses the terms

C. A. 1892 LAMB v. EVANS. Bowen, L.J.

(as to the use which might be made of the materials obtained) might be necessarily different—but take this business as a business of an ordinary kind. An employer gives to his agent by employing him the means of obtaining in his name and for the purposes of the contract certain materials and certain information which has been committed for the purposes of that contract to writing. Is it intelligible that the bargain made between the principal and agent should be any other than one which implies that the agent, having obtained these materials and information under the cover of this agency, is not to turn round and use the materials against his employer as soon as the agency is determined? It seems to me that in this case the proper inference to be drawn would be that it was part of the understanding that these materials were not to be used otherwise than for the purposes of the employment in the course of which they were obtained. It is true that you must find out the terms here as elsewhere partly from the written document and partly from all the surroundings of the written document, such as the nature of the transaction with regard to which the document is brought into life. But it is not true to say that because you cannot find them in the written document itself, or in any implication to be extracted from the words used, that therefore you are not to imply them. You must take the words used with reference to the subject-matter about which they are used, and, taking the subject-matter and document together, you must ask yourself what is the necessary implication to be drawn. Nothing could be a clearer illustration of this than the well-known cases, of which I will mention one as typical: *Abernethy* v. *Hutchinson* (1). It was a case in which somebody attending lectures given by Mr. *Abernethy* proposed afterwards to publish the lectures for profit. That case was very near the dividing line, and the question there depended upon what was the real relation which must have been understood by both parties to be created between the student and the lecturer. Was it possible to suppose that the student was to be at liberty to destroy the value of the lectures to the lecturer by publishing them for profit? The Lord Chancellor thought not, and on that line the

(1) 3 L. J. (O.S.) (Ch.) 209.

case was decided. Take another case, which Mr. *Farwell* put in illustration. A pupil goes to a conveyancer. He carries away, it is true, the precedents for his own use and for his own profit, because that is the understanding between the parties. The latter case accordingly would fall on the other side of the dividing line. But it does not follow that a student who went to a conveyancer could take all the precedents of the conveyancer and publish them in a book as against the conveyancer, which would seem to fall within the spirit of *Abernethy's Case* (1). You must look at the whole transaction, and make up your mind what the parties must have intended if the transaction is to have any business-like efficacy at all. If you see that it could not have been intended by the parties that the agent should be allowed to deal in the way he is proposing to do with materials obtained in the course of his agency, then the law will imply that it was part of the bargain that he should not do so. It is said by Mr. *Farwell* that it must have been intended that the confidential fetter imposed upon the use of these documents should terminate as soon as the book was published for which they were being compiled; and he urges that otherwise we should be importing questions of copyright into the discussion of this branch of the case. On the contrary, it is by insisting on that view that he imports the idea of copyright into this part of the case. The point we are now considering has nothing to do with it. It is perfectly true that you must look at the whole transaction to see what the documents and materials had been collected for; but that would by no means sufficiently protect the employer if the agent was to be left free to do what he liked with the materials the moment the volume was published. That argument, it seems to me, cannot prevail. The only case that can be cited at all as inconsistent with the law, I think, as expressed by the Legislature, and as I have tried to explain it also, is *Reuter's Telegram Company* v. *Byron* (2), before the late Master of the Rolls, a great lawyer, but a rapid lawyer, and one who certainly sometimes brushed away cases in a speedy and perhaps somewhat imperious way. I think if *Reuter's Case* is to be judged of by the result it

(1) 3 L. J. (O.S.) (Ch.) 209. (2) 43 L. J. (Ch.) 661.

C. A. 1892 LAMB v. EVANS. Bowen, L.J.

no doubt is right—and Sir *George Jessel* was generally right; but I do not think that the propositions reported in the *Law Journal* as laid down by him can be considered to be sound. It seems to me that as a matter of law or as a matter of equity the conduct of the defendants in that case cannot be justified to the extent to which that learned Judge is made by the report to justify it. If *Reuter's Case* (1) is cited as an authority for the propositions which the Master of the Rolls is there stated to have laid down, I am not prepared to follow it.

KAY, L.J.:—

I am of the same opinion. On both points I will very shortly state my view.

In the first place, I have no doubt that the headings used in this book of the Plaintiff's are the subject of copyright. The headings are short descriptions of the particular trades which are there gathered together; but each separate heading of those is put so that the proper catch-words occur first in alphabetical order in the book, and each of those headings is repeated in three other languages after the English heading. I am not satisfied at present that the Defendants had anything to do with the English headings. It may have been so; but certainly the English headings were translated by persons who were employed and paid by the Plaintiff to do it. These headings are published in the Plaintiff's book, arranged in a certain alphabetical order, and followed by a series in each case—longer or shorter, as the case may be—of advertisements coming under that particular heading. Mr. *Farwell* contended, that if there was any copyright in those headings—which I understand him to deny—it must be the copyright of the persons who composed them, because, in order to make them the copyright of the owner of the book under sect. 18 of 5 & 6 Vict. c. 45, it is necessary for the Plaintiff to prove that it was a term of the arrangement between him and the composer that the copyright should belong to the Plaintiff. I do not dissent from that view of the law. Now, in the first place, I think that there is sufficient literary labour involved in the production of those headings to make them properly the subject of

(1) 43 L. J. (Ch.) 661.

copyright. Then I will assume that they were prepared by an agent or agents of the Plaintiff; perhaps the simplest way would be to suppose that one agent did the whole of the headings—that he composed the English headings and added the translations of them. Now, as it has been pointed out, it is not required by the State, nor, so far as I am aware, by any principle of law, that the terms, as between the owner of the book and the people he employed, that the copyright in the headings should belong to the owner of the book should be in writing. In fact, the decisions are to the contrary, and shew that you may make out the terms by anything that satisfies the usual rules of evidence. What have we here? We have a very bulky book, with perhaps thousands of things in it, prepared by, I dare say, a great number of hands; it may be one man furnishing the headings, and one or two other men furnishing the translations—for we are not informed precisely how the work was done. What is the fair inference from the facts of the case? Surely the inference is that the man who is to go to the expense of printing and publishing this book will, as between him and the agents he may have employed to assist him in the compilation of it, have in himself whatever property the law will give him in that book. That is the inference I should certainly draw; and, I think, in this case it is sufficiently clear, in the absence of evidence to the contrary, that the terms of employment of those several agents involved this, that the copyright in the portions of this book which they composed should belong to the owner of the book.

I will add a few words on the other part of the case, which involves a perfectly different question, wholly unconnected with copyright. We have here a form of agreement entered into between the Plaintiff and the Defendants *Evans*. They were persons employed by him upon the Continental part of this book, which is a comparatively small part of it. They were employed in various countries of *Europe* to travel about and to obtain from manufacturing producers of all sorts and kinds the authority from them to enter under the particular heading to which their respective businesses related advertisements of the names and addresses of the manufacturers, and, in some cases, of their trade-marks; and each person who chose to furnish his name and

C. A. 1892 LAMB v. EVANS. Kay, L.J.

address and sufficient particulars could obtain the insertion of an advertisement under the proper heading in this book on payment of a certain sum which the agent—he is called agent in the contract—was to receive. He was to receive that, of course, on behalf of his principal; but as between his principal and himself it was part of the agreement that he should deduct and retain from it a very large percentage as his remuneration for what he had to do. In the course of this agency there would come into his hands various materials. I take for granted that he would have a note-book, in which he would note down all the information collected from the people whom he canvassed, and he would also in some cases get blocks from which the trade-marks were to be printed in these advertisements. His duty was to put these advertisements into shape from such materials as he obtained, which sometimes might be a mere copy or translation of a foreign advertisement given him by the particular advertisers. Whatever the materials were, his duty was to put those materials into shape and translate them into the English language, and then to transmit them to the Plaintiff to be printed under the proper heading in this book. Now, I will suppose that one of these Defendants had a note-book which contained practically all the materials which he has supplied to this book, including the headings which he may have copied into his note-book. The part of the injunction complained of on this point is an injunction restraining the Defendants from displaying or using for the purpose of obtaining advertisements for any book other than the Plaintiff's said work so much of the copy of the Defendants' book already printed as consists of the heading, and from using (and this is the part now complained of) blocks or materials obtained by the Defendants *Evans*, or either of them, while in the employment of the Plaintiff, and for the purpose of his said work or any copy thereof, for the purpose of any work other than the said work of the Plaintiff's. Now, it has been argued that that goes too far. The particular wording technically is not material. The illustrations given in argument shew that there might be some material collected by the Defendants while they were the Plaintiff's agents and for the purposes of his book, which material could be legally used for the new

book. The argument was put most forcibly as I followed it in this form: Why should they not retain these note-books in their hands, having now left the Plaintiff's employ, and use them in order to find out the persons abroad with whom they had formerly entered into engagements, and to obtain from those advertisers authority to put advertisements of theirs into a rival publication to be published as a rival of the Plaintiff's book? The answer is a very simple one. All those materials were obtained while you, the Defendants, were acting as the Plaintiff's agents, while you were in that confidential relation to him and for the purpose for which he employed and paid you, viz., of compiling this book of the Plaintiff's, and therefore to allow you to use any of those materials for your own purposes would be allowing you to use them for a purpose for which they were not compiled—you, while you compiled them, being in the position of the Plaintiff's agent, and there being a confidential relation between you and the Plaintiff. I turn to one of the leading cases on this subject, and I take the language of Lord Justice *Turner* in his judgment in *Morison* v. *Moat* (1): "That the Court has exercised jurisdiction in cases of this nature does not, I think, admit of any question. Different grounds have indeed been assigned for the exercise of that jurisdiction. In some cases it has been referred to property, in others to contract, and in others, again, it has been treated as founded upon trust or confidence—meaning, as I conceive, that the Court fastens the obligation on the conscience of the party, and enforces it against him in the same manner as it enforces against a party to whom a benefit is given, the obligation of performing a promise on the faith of which the benefit has been conferred; but upon whatever grounds the jurisdiction is founded, the authorities leave no doubt as to the exercise of it." Then the judgment goes on to give several instances, and many of them are of cases where a man, being in the employment of another, has discovered the secrets of the manufacture of that other person, or has surreptitiously copied something which came under his hands while he was in the possession of that trust and confidence, and he has been restrained from communicating that secret to anybody else,

(1) 9 Hare, 241, 255.

C. A. 1892 LAMB v. EVANS. Kay, L.J.

and anybody who has obtained that secret from him has also been restrained from using it. But amongst the instances of this doctrine given is that one to which Lord Justice *Bowen* has referred, and, as he desires me to repeat it, I will only repeat it in a few short sentences from the judgment in *Morison* v. *Moat* (1). "The question again came before him" (that is Lord *Eldon*) "in Mr. *Abernethy's Case* (2), in which Mr. *Abernethy* had filed a bill to restrain the publication of the lectures delivered by him at *St. Bartholomew's Hospital*; and I well remember, that, upon the first argument, he refused to grant the injunction on the ground of copyright, Mr. *Abernethy* not being able to swear that the whole lecture was written; but that afterwards, on a second argument, he granted it on the ground of breach of confidence." Then he goes on to deal with the case with which we are all familiar, *Prince Albert* v. *Strange* (3). There a man entrusted by the plaintiff with copperplates for the purpose of taking impressions for the plaintiff took surreptitiously additional impressions, which came into the hands of the defendant *Strange*, who published a catalogue of them. He was restrained from doing it because, as Lord Justice *Turner* says, he obtained them by a breach of the trust and confidence under which the things to be described in that catalogue had been entrusted to the care of the printer. So that I think the doctrine goes further than Mr. *Farwell* was inclined to admit in his argument, and it does extend to every case in which a man has obtained materials (I use the word advisedly, because it would be very difficult indeed to grant an injunction to prevent a man using his knowledge)—where a man has obtained materials while he was in the position of agent for another—materials which were obtained by him in the course of that agency and were to be used for the purposes for which his principal had employed him. I say it is not going too far to say to him, "You shall not use those materials so obtained for any other purpose than the purpose for which you were employed to obtain them"; and the employer, if he can make out that the intended use is one which would tend to damage him, has a right to come, and a very distinct ground for coming, to the

(1) 9 Hare, 256. (2) 3 L. J. (O.S.) (Ch.) 209.
(3) 1 Mac. & G. 25.

Court and saying, "Restrain my agent from using in a way which will injure me the materials which he got while he was in my employment." Mr. *Farwell* has very ingeniously said, assuming the doctrine goes as far as that, where the materials were to be obtained for the purposes of a publication which was to be given to the world, assuming that he could not use them until the publication has been given to the world, why should he not use them when it has been? I beg leave to answer that argument in the words again of Lord Justice *Turner*, which I take from another part of his judgment in *Morison* v. *Moat* (1). He said: "It was much pressed in argument on the part of the defendant, that the effect of granting an injunction in such a case as the present would be to give the plaintiffs a better right than that of a patentee; and the case of *Canham* v. *Jones* (2) was cited on the defendant's behalf; but what we have to deal with here is, not the right of the plaintiffs against the world, but their right against the defendant. It may well be, that the plaintiffs have no title against the world in general, and may yet have a good title against this defendant." That seems to me a complete answer. The jurisdiction against these Defendants is because these materials which they want to use were obtained by them when they were in the position of agents for the Plaintiff, and, although the Plaintiff might not be able to prevent anybody else in the world from publishing or using such materials as he is trying to prevent these Defendants from using, that would be no answer, because these Defendants, from the position in which they were in, are put under a duty towards the Plaintiff not to make this use of the materials. I therefore think that, subject to the verbal correction which Lord Justice *Lindley* has made, the injunction does not go at all too far in restraining the use of the materials which the Defendants obtained during the time of their agency. I do not think it necessary to express any confident opinion whether there is or is not copyright in the advertisements. I confess from the statement of the evidence which has been made to us, I should rather be inclined to think there was a copyright in this publication of the advertisements, collected and arranged as they are; but if this case is to go any

(1) 9 Hare, 258. (2) 2 V. & B. 218.

C. A. 1892 LAMB v. EVANS. Kay, L.J.

further, there may be further evidence on that question, and the question may be more deliberately tried hereafter. However, I confess that I myself, upon the materials before us, cannot form any confident opinion that there was not a copyright even in the advertisements which were the subject of this book. I agree on the whole that this appeal fails, and I think it should be dismissed with costs.

Solicitors: *Rye & Eyre; C. J. Rawlinson.*

H. C. J.

C. A. 1892 *Nov.* 16, 24.

JACKSON *v.* BARRY RAILWAY COMPANY.

[1892 J. 1196.]

Arbitration—Unfitness of Arbitrator—Injunction—Jurisdiction.

A contract by which the Plaintiff undertook to construct a dock for the Defendant company provided that any dispute between the company and the contractor as to the meaning of any part of the contract, or as to the quality or description of the materials to be used in the works, should be referred to the company's engineer as arbitrator. A dispute arose whether the contract required the interior of a certain embankment to be made of stone, or whether rocky marl was allowable, so that, if the contractor by the direction of the engineer used stone, he would be entitled to be paid for it as an extra. A correspondence took place between the contractor and the engineer, in which the engineer stated his view to be that the contract bound the contractor to use stone, and that it was not an extra. The company then referred the dispute to the arbitration of the engineer. After this reference, and on the day for which the first appointment had been made, the engineer wrote to the contractor a letter in which he repeated his former view. The Plaintiff brought his action to restrain the company from proceeding further with the arbitration.

Kekewich, J., held, that the last letter shewed that the engineer had finally made up his mind on the point, and was, therefore, disqualified to act as arbitrator, and granted an injunction :—

Held, on appeal, that, considering the position of the engineer who, as engineer of the company, must necessarily have already expressed an opinion on the point in dispute, his writing after the commencement of the arbitration a letter repeating the same opinion would not disqualify him from acting as arbitrator unless, on the fair construction of the letter, it appeared that he had made up his mind so as not to be open to change it upon argument:

Held, by *Lindley* and *Bowen*, L.JJ. (dissentiente *A. L. Smith*, L.J.),

that the letter in question did not, upon its fair construction, shew that the engineer had precluded himself from keeping his mind open, and that the injunction ought to be dissolved; and whether there was jurisdiction to grant it, *quære*.

ON the 27th of November, 1891, the *Barry Railway Company* accepted a tender by the Plaintiff to construct for them a dock at the price of £152,938 7*s.* 6*d.*, according to a specification containing various conditions and stipulations, among which was the following.

"50. In the event of any question or dispute arising between the company and the contractor as to the intent and meaning of any part of this specification, or of the drawings referred to therein, or of any further drawings to be prepared, or as to the intent and meaning of any part of the tender or schedule of quantities and prices, or the application of the same to the account of the contractor, or as to the manner of executing the works, or the quality or description of the materials, implements, or plant, used or required to be used in the works, or as to the mode of measuring the works, or the computation of or payment for the same, or as to the interpretation, meaning, or effect of the clauses and conditions of the contract, or of any of them, or as to any other matter or thing whatever connected with or arising out of the contract or incidental thereto, or not thereby provided for, such questions or disputes shall be referred to the engineer, whose decision shall be conclusive and binding on both parties."

By a former clause it had been provided that in the specification the word "engineer" should be held to mean *J. W. Barry*, Esq., or other the engineer for the time being appointed by the company.

In the course of executing the works a question arose as to the construction of a particular embankment or breakwater. That it was to be faced with stone was undisputed; the question was as to the filling up. The engineer assented to a portion of the filling up being done with rocky marl, but required the rest to be rubble stone, which was much less advantageous to the Plaintiff than filling up with rocky marl. That the engineer could direct stone to be used was undoubted, the question being whether

C. A. 1892 JACKSON v. BARRY RAILWAY CO.

the contractor was entitled to be paid for the stone as an extra. A correspondence took place on the subject between the Plaintiff and Mr. *Barry*. On the 20th of July Mr. *Barry* wrote, "Although the whole of the hearting of the old breakwater consists of hard rock filling, I am willing to agree as a concession to you that a portion of the hearting of the closing bank may be formed of rocky marl, the remainder of the closing bank being made with hard rock obtained by the excavation of the lock, which is to be selected and put into the closing bank instead of being carried to spoil or used in any other way." On the 22nd the Plaintiff wrote: "I can only say that we are saving the good stone we are now getting from the lock excavations for use in the internal masonry as provided in the note on p. 39 of the specification, and I must decline to deposit it as you wish at the breakwater unless it is agreed that I shall be paid for it." On the 25th Mr. *Barry* wrote: "I have received your letter of the 22nd of July, 1892, in which you refuse to deposit any of the stone obtained from the excavations of the lock as required by me in the closing bank to the western breakwater unless it is agreed that you shall be paid for it. I beg to say that I am willing to hear any arguments which you may have to adduce in support of your construction of the specification; but I distinctly decline to come to any agreement on the subject until the arguments are heard on both sides and the matter is decided. In the meantime I call upon you to proceed with the work in accordance with my instructions." On the 26th, Mr. *Barry* wrote a letter, which was in part as follows: "The bank to the breakwater is not a tip for spoil, as you seem to describe it, but is a contract work specially shewn upon the contract drawing, and referred to in the specification, and was always intended to be made of hard rock from the excavation through the whole of its cross section, until, as a concession to you, I agreed that the central part might be made of rocky marl according to a cross section which had been sent to you shewing what I would accept."

The Plaintiff adhered to the view that he was not bound to fill up with stone unless he was paid for it as an extra; and the company's solicitors, on the 28th of July, gave notice to the

Plaintiff that they should forthwith apply to the engineer to fix an early day for hearing the parties and determining the dispute. They applied accordingly on the same day, and on that day the engineer made an appointment for the 2nd of August, on which day a meeting took place, at which the engineer appointed a legal gentleman to be his assessor. On the 1st of August the Plaintiff commenced this action to have the construction of the specification as regards this question determined, and for an injunction to restrain the company from proceeding with the arbitration.

On the 28th of July the Plaintiff wrote to Mr. *Barry* a long letter, giving various reasons in support of his own construction of the specification, and containing the following statement:— "Moreover, after the tender was accepted, it was I who first suggested to you the unadvisability of using marl for the hearting of the breakwater without a stone bank to protect it."

On the 2nd of August Mr. *Barry* replied as follows: "I have your letter of 28 July. In view of the fact that this matter has now reached the stage of arbitration, I must decline to enter into any of the arguments advanced in that letter, and will content myself by saying, in order to avoid any misconstruction which might hereafter arise from my allowing the statement to pass unnoticed, that I cannot in any way agree with your statement that it was you who first suggested 'the inadvisability of using marl for the hearting of the breakwater without a stone bank to protect it.' On the contrary, as I have already stated in my previous letters, there was never any intention to construct this breakwater in any way differently from the others, namely, exclusively of stone filling, with protecting stones on the outside, and smaller protecting stones on the inside, until in December last I agreed to accept a small portion of rocky marl as a concession to you."

The Plaintiff moved for an injunction, and on the 10th of August, 1892, Mr. Justice *Kekewich* granted it, saying that, as the parties had chosen to refer all matters in dispute to Mr. *Barry*, the Court could not take into consideration that he might have a strong natural bias to construe the contract in the manner most creditable to himself, as being responsible for

C. A. 1892 JACKSON v. BARRY RAILWAY CO.

its contents, but that the clause making him arbitrator was never intended to enable him to act as such upon a question on which he had come to a foregone conclusion, and that his letters, especially that of the 2nd of August, shewed that he did not bring an open mind to the case, but had fully made up his mind upon it.

The Defendants appealed. The appeal was heard on the 16th of November, 1892.

Marten, Q.C. (with him Sir *R. Webster*, Q.C., and *Kenyon Parker*), for the appeal, after stating the facts of the case, was stopped by the Court.

Rigby, S.G., *Warmington*, Q.C., and *Mulligan*, for the Plaintiff:—

When a point was referred to the engineer for arbitration, he ceased to act as engineer of the company, and became an arbitrator, and he did so at the latest on the 28th of July. When he became an arbitrator, he was bound like any other arbitrator to abstain from any expression of opinion on the matter in dispute. Instead of so abstaining, he, in his letter of the 2nd of August, gives his decided opinion that he always intended the breakwater to be made of stone. We admit that by the contract we submit to the arbitration of a person who has an amount of bias, for the engineer of a company must have a bias in favour of the company; but this very consideration ought to make him more particular to keep himself as unbiassed as he can.

[LINDLEY, L.J.:—If he had never written the letter of the 2nd of August, you would have known from his former letters that he had an opinion on the point in dispute.]

Yes, but the former letters were written before he had assumed the position of arbitrator. Here, after assuming that position, he writes a letter shewing that, before hearing arguments, he has made up his mind. Where parties suppose that an arbitrator is independent, proof that he is the agent of one of the parties will disqualify him; and even where he is known to be the agent of

one party, the Court will interfere if he shews bias: *Nuttall* v. *Mayor of Manchester* (1).

[BOWEN, L.J.:—Where an application is made to stay an action because there is a provision for referring disputes to arbitration, the Court, under the *Arbitration Act*, 1889 (52 & 53 Vict. c. 49), has a discretion. Here the application is the other way, to stay the arbitration.]

We admit that the burden of proof is on us to shew that the arbitration ought not to be allowed to proceed.

[A. L. SMITH, L.J.:—In *Nuttall* v. *Mayor of Manchester* we thought that the arbitrator would be judge in his own cause, and be deciding whether or not he had himself been guilty of professional negligence.]

This is substantially the same case; the engineer's reputation is at stake. He had settled a contract, which we say allows the use of rocky marl in this embankment. He now thinks it ought to be all stone, and he is under a great bias to decide that the contract requires stone. The case of *Scott* v. *Parochial Board of Carluke* (2), which was referred to below on the other side, is rather in the Plaintiff's favour than otherwise. The engineer there had only made a report in the regular course of his duty, he had neither said nor done anything which must not be taken to have been within the contemplation of the parties when they entered into the contract. The late Master of the Rolls in *Beddow* v. *Beddow* (3) lays down the principles on which the Court will act in interfering with an arbitration. When the arbitrator has expressed a decided opinion on the construction of a document prepared by himself, an arbitration is futile.

Marten, in reply:—

The action was not brought on the faith of the letter of the 2nd of August, on which the Plaintiff now relies, for it was not written till after the action had commenced. The letter does not bear the construction sought to be put on it. Mr. *Barry*, in substance, says: "As the matter is come to the stage of

(1) 8 Times L. R. 513.
(2) 6 Court Sess. Cas. 4th Series, 616.
(3) 9 Ch. D. 89, 93.

C. A. 1892 JACKSON v. BARRY RAILWAY CO.

arbitration, I will not enter into your arguments; but I must correct the statement of fact contained in your last letter."

[A. L. SMITH, L.J., referred to the expression in the letter of the 2nd of August, as to the employing a portion of rocky marl being a "concession."]

That is not giving a concluded opinion that the stone is not to be paid for. The Solicitor General's position, that when Mr. *Barry* becomes an arbitrator he ceases to be in the position of the company's engineer is fallacious; his office of engineer can never cease while the works are going on. *Nuttall* v. *Mayor of Manchester* (1) is quite different, being a case where the temptation to the surveyor to decide against the plaintiff would be extreme.

1892. Nov. 24. LINDLEY, L.J.:—

This is an appeal from an order made by Mr. Justice *Kekewich*, granting an injunction to restrain the Defendants, the *Barry Railway Company* and their agents, until the trial, from further proceeding with a reference to arbitration before Mr. *John Wolfe Barry* on the question which had arisen under the agreements in the writ of summons mentioned.

It appears by those agreements that Mr. *Jackson*, the Plaintiff, undertook certain works for the *Barry Railway Company*. The engineer was Mr. *John Wolfe Barry*. The agreement for the construction of the works is a long one, and contains a great number of clauses, which have become common in contracts of this kind, and in particular there is clause 50, which I will read. [His Lordship read clause 50.]

Now, that is part of the bargain, and it means, to put it shortly, that if any dispute arises between the contractor and the company, or in substance—the engineer being the person to look after the contractor in the interest of the company—any dispute arises between the contractor and the engineer, it is to be decided by the engineer. A question did arise as to whether, under the terms of the contract, the contractor was bound to use stone for a certain portion of the works which he had con-

(1) 8 Times L. R. 513.

tracted to do, and whether, if he was bound to use it, the price of it was covered by the contract price, or was to be treated and paid for as an extra? The contractor did not deny that he was bound to put in stone if ordered by the engineer, and the engineer did order it; but the question then was, whether the contractor was bound to put in stone for the contract price, or whether if he put in stone in obedience to the order of the engineer that would be an extra. The engineer told the contractor his view of it, and I do not see how, considering his position, he could help expressing his view. His view was that the contractor was bound to put in this stone, and was not at liberty to charge for it as an extra. The contractor's view was that if he put it in he was at liberty to charge for it as an extra.

That being the nature of the question which had arisen, the company proceeded to make arrangements to have it settled by arbitration, and on the 28th of July Mr. *Barry* appointed "12 o'clock noon on Tuesday next, the 2nd of August, for proceeding with the arbitration." Before that date arrived Mr. *Jackson* wrote a long letter to Mr. *Barry* enforcing his views, and containing a statement which Mr. *Barry* did not admit to be accurate, and on the 2nd of August, 1892, which it will be observed was the day already fixed for the arbitration, Mr. *Barry* wrote and sent to Mr. *Jackson* the letter which I am about to read. [His Lordship read Mr. *Barry's* letter of the 2nd of August.]

Now, it is contended by Mr. *Jackson*, and the learned Judge has acceded to that contention, that the true inference to be drawn from this letter is that Mr. *Barry*, who was then about to enter upon his duties as arbitrator, had not left his mind open, but had, before hearing the case and before being advised by his legal assessor, so tied himself down by this letter as not to leave it reasonably open to him to depart from the view which he had previously taken and previously expressed. Unquestionably, if I drew the same inference from this letter, I should agree in the consequence; but I am unable to draw that inference. It appears to me that when you look at this letter carefully it well admits of this construction, that Mr. *Barry* merely repeats

C. A. 1892 JACKSON v. BARRY RAILWAY CO. Lindley, L.J.

what he had said scores of times before, that in his opinion the contract entitled the company to have stone without paying extra for it. I do not understand this letter as expressing, or as implying or insinuating, "I have made up my mind, and whatever I may hear or my assessor may advise me, I shall stick to my opinion." I think it would be a strained interpretation to come to that conclusion. Unless that is so, unless we can draw the inference that the engineer has precluded himself by this letter from keeping his mind open, and from deciding according to the evidence and according to the advice which might be given him, we ought not, in my opinion, to stop this arbitration, and I say that the more readily because under the 19th section of the *Arbitration Act*, 1889, there is a method by which the contractor can, if he feels aggrieved, obtain the opinion of the Court upon the true construction of the contract. Under that section the engineer can, and, if directed by the Court, he must state a case for the opinion of the Court upon any question of law arising in the course of the reference, and I cannot infer from this letter that Mr. *Barry* was in the least reluctant to exercise that power even without the direction of the Court.

Upon these grounds I am unable to concur in the view taken by the learned Judge, and I think the injunction ought to be discharged.

I have assumed, for the moment, that there is jurisdiction to grant the injunction. That point was not pressed and was but slightly argued, and I pass it by, simply observing that if the point ever should come up for decision again it must be more carefully considered than it has been in this case. I do not deny the jurisdiction, far from it; but, on the other hand, I wish to guard myself from passing this point over as if an injunction were a matter of course. I decide the question upon the merits. I cannot agree with the learned Judge, and I think the appeal must be allowed, and the order discharged with costs.

BOWEN, L.J.:—

It was an essential feature in the contract between the Plaintiff and the railway company that a dispute such as that which

has arisen between the Plaintiff and the company's engineer should be finally decided not by a stranger or a wholly unbiassed person but by the company's engineer himself. Technically, the controversy is one between the Plaintiff and the railway company; but, virtually, the engineer, on such an occasion, must be the judge, so to speak, in his own quarrel. Employers find it necessary in their own interests, it seems, to impose such terms on the contractors whose tenders they accept, and the contractors are willing, in order that their tenders should be accepted, to be bound by such terms. It is no part of our duty to approach such curiously-coloured contracts with a desire to upset them or to emancipate the contractor from the burden of a stipulation which, however onerous, it was worth his while to agree to bear. To do so, would be to attempt to dictate to the commercial world the conditions under which it should carry on its business. To an adjudication in such a peculiar reference, the engineer cannot be expected, nor was it intended, that he should come with a mind free from the human weakness of a preconceived opinion. The perfectly open judgment, the absence of all previously formed or pronounced views, which in an ordinary arbitrator are natural and to be looked for, neither party to the contract proposed to exact from the arbitrator of their choice. They knew well that he possibly or probably must be committed to a prior view of his own, and that he might not be impartial in the ordinary sense of the word. What they relied on was his professional honour, his position, his intelligence; and the contractor certainly had a right to demand that whatever views the engineer might have formed, he would be ready to listen to argument, and, at the last moment, to determine as fairly as he could, after all had been said and heard. The question in the present appeal is, whether the engineer of the company has done anything to unfit himself to act, or render himself incapable of acting, not as an arbitrator without previously formed or even strong views, but as an honest judge of this very special and exceptional kind. I will assume (without deciding) what was assumed by both sides, in the argument at the Bar, that the point before us is properly raised in such an action as the present, and consider the matter entirely on the merits. That the letter of the 2nd of August shews Mr.

C. A. 1892 JACKSON v. BARRY RAILWAY CO. Bowen, L.J.

Barry to have had, and retained up to the opening of the arbitration, a rooted view that the contractor was wrong, is obvious. This Mr. *Barry* may not have been able to avoid. Has he, then, disqualified himself from pursuing the function of such an arbitrator as the contract contemplates, by informing the contractor, in answer to the contractor's controversial letter, of what the contractor, I am convinced, well knew already, viz., that Mr. *Barry* wholly disagreed with him? I cannot see that the letter of the 2nd of August warrants the inference that Mr. *Barry* would not or could no longer do his best, when the matter formally came before him and his legal assessor, to decide honestly between his own distinct view and that of the contractor. He restates, it is true, what he had already stated, and I daresay he thought it fair and honest towards the contractor to do so. I should agree with my Brother *Kekewich's* judgment, if I thought the letter of the 2nd of August amounted to an intimation that the contractor would not be patiently listened to and receive at the last an honest decision. Where I differ from my Brother *Kekewich* is, that he seems to me not to have made sufficient allowance for the very special character which by the contract this arbitrator had to fulfil, and to have required from the engineer of the company—who must necessarily be a somewhat biassed person, but, by whose decision, nevertheless (fairly given), the parties had contracted to be bound—the icy impartiality of a *Rhadamanthus*. The difficulty in the contractor's way arises, not from the engineer's utterances in the letter of the 2nd of August, but from the fact that the contractor, by his contract, has pledged himself to submit this very dispute that has arisen to the person with whom he virtually is waging it. The contractor is, as it appears to me, catching at a straw; endeavouring, on the ground that the engineer had revealed a view which every one was aware he entertained, to escape from an onerous arbitration clause which the contractor accepted as part of the consideration for his bargain. To release him on such a pretext would be to dissolve his obligations under the contract and to substitute, by force of the power of this Court, a wholly different and far more agreeable kind of arbitrament before either some stranger or a jury of strangers—a

tribunal which it was the express object of this contract to exclude.

For these reasons, I differ with reluctance from my Brother *Kekewich*, with whose views as to the importance of judicial impartiality I entirely coincide, regarding them only as not quite applicable to this special case, in which it was part of the very bargain that the scales of justice in the case of a dispute need not be held in a neutral or wholly indifferent hand.

A. L. SMITH, L.J.:—

This is an appeal from the judgment of Mr. Justice *Kekewich*, who granted an injunction restraining the *Barry Railway Company* from proceeding further with an arbitration between the company and its contractor, Mr. *Jackson*. The ground of the judgment is that Mr. *Barry*, the arbitrator, had expressed in writing that he had arrived at a determination of the point in dispute before he had heard Mr. *Jackson*, or his witnesses, or, in other words, that the evidence shewed that Mr. *Barry*, as arbitrator, had prejudged the case. In November, 1891, Mr. *Jackson*, the applicant for the injunction, had contracted with the *Barry Railway Company* to construct for it, amongst other works, the bank of the western breakwater. By this contract Mr. *Barry* was appointed engineer of the works, and it was further contracted that in case of disputes arising between Mr. *Jackson* and the company they should be referred to Mr. *Barry*, whose decision should be final. There is no doubt that the dispute which has arisen between Mr. *Jackson* and the company is within clause 50 of the contract, which constituted Mr. *Barry* sole arbitrator in the matter. The dispute is whether by the contract the interior or "hearting," as it is called, of the bank of the breakwater is to be constructed of stone or of rocky marl, and if of stone, whether the company is to pay for such as an extra.

It was not disputed at the Bar, and I will assume it to be the law that the rule laid down by Sir *G. Jessel* in *Beddow* v. *Beddow* (1) is correct—viz., that an injunction will be granted to restrain an arbitrator from proceeding to hear a case when from any special reason he is unfit or incompetent to hear it.

(1) 9 Ch. D. 93.

C. A. 1892 JACKSON v. BAREY RAILWAY CO. A. L. Smith, L.J.

It is obvious under the contract that the parties have placed Mr. *Barry* in a double capacity, the one being that he is to act as engineer of the works, to design them, to give directions as to how they are to be carried out, and to see that Mr. *Jackson* faithfully performs the provisions of the contract: the other being that should disputes arise between Mr. *Jackson* and the company touching the contract or works Mr. *Barry* should act as arbitrator between them. It appears to me that Mr. *Barry*, when acting as engineer of the works, was not only empowered but bound to put his own construction upon the contract, and to direct Mr. *Jackson* as to how the works were to be carried out and to insist upon what he directed being executed.

It appears also to me that when a dispute arose and Mr. *Barry* became the arbitrator, no matter how difficult it might be for him to lay aside his preconceived opinions, expressed as they properly may have been by him as engineer to the contractor, he was in duty bound as far as possible to do so and to keep an open mind as to the matters upon which he was called upon to adjudicate, and if it be shewn that he has failed in this duty, then, in my judgment, to use the words of Sir *George Jessel*, he is not fit or competent to adjudicate upon the case.

Now, what are the facts? In the spring of 1892, after the works had proceeded some way, the question arose whether by the contract Mr. *Jackson* was to fill up the hearting of the bank of the breakwater with rocky marl or with stone, and if with stone, was it to be paid for as an extra? Mr. *Barry* as engineer took up the position that under the contract the filling was to be done with stone and that it was not an extra. Here Mr. *Barry* was well within his rights, and no possible complaint can be made as to this. We are told that the decision of Mr. *Barry* involves an expenditure to Mr. *Jackson* of many thousands of pounds, but this is nothing to the point. Arbitration pursuant to the contract was agreed upon to settle this dispute, and Mr. *Barry* became the arbitrator.

On the 25th of July, 1892, Mr. *Barry* wrote as follows to Mr. *Jackson*: [His Lordship read the letter of that date which is given above.] That was a very proper letter.

On the 28th of July, 1892, Mr. *Jackson* wrote to Mr. *Barry* a

long letter in order, as he says therein, to recapitulate what he had already stated verbally and in writing, and to deal with the whole case. In short, he states reasons why he was entitled to be paid for stone as an extra: that Mr. *Roberts* (a local engineer of the company) had said that he was to be, and that he, *Jackson*, had first suggested the inadvisability of using rocky marl.

On the 2nd of August, 1892, the first meeting of the arbitration took place, and Mr. *Barry* appointed Mr. *Beale* to act with him as his assessor. On this day, whether before or after the meeting does not appear, Mr. *Barry* wrote as follows to Mr. *Jackson*: [His Lordship read the letter of the 2nd of August.]

Had this letter stopped at the words "a stone bank to protect it," there would have been nothing to complain of; he was there answering a statement of fact made by Mr. *Jackson*; but it does not stop there. It proceeds, as I read it, as follows: "On the contrary, as I have already stated in my previous letters (and I again state now), there was never any intention to construct this breakwater in any way differently from the others, namely, exclusively of stone . . . until, in December last, I agreed to accept a small portion of rocky marl as a concession to you"—that is, allowing you to use marl which you were not entitled to do under the contract, or, in other words, as I understand it, that the hearting was by the contract to be of stone and not rocky marl, which was the very point Mr. *Barry*, when he wrote this letter, was arbitrating upon between the litigants.

What is the inference to be drawn from this letter, if I read it correctly? In my judgment it is that Mr. *Barry* instead of setting aside as best he could his old opinions and keeping an open mind, was as arbitrator not only reasserting but committing to writing at the commencement of the arbitration the opinion he had theretofore formed and expressed when acting as engineer. This letter, in my judgment, enables Mr. *Jackson* to demonstrate to the Court the real state of mind of Mr. *Barry* as arbitrator, and it shews that he was not doing his duty—viz., keeping an open mind upon the matters in dispute—and in these circumstances Mr. *Jackson* is entitled to come to the Court for relief, and the decision of Mr. Justice *Kekewich* is correct. As to the point that the *Arbitration Act* enables Mr. *Jackson* to have a

C. A. 1892 JACKSON v. BARRY RAILWAY CO. A. L. Smith, L.J.

special case stated, I have to add that it is Mr. *Barry* who would state it, and no one else. It is true that the writ was issued upon the 1st of August, before the letter of the 2nd was written. The principal part of the claim upon that writ is misconceived, but the motion upon which judgment was given was founded upon the letter of the 2nd of August, 1892. The company, in my opinion, would have been very well advised to have accepted the offer of Mr. *Jackson*—viz., to appoint any other gentleman of position the company might select to adjudicate upon the dispute. They have not done so, and in my judgment this appeal should be dismissed. Knowing as I do that I am failing to agree with those whose opinion I hold in the highest respect, I need hardly say that I have great doubt if the judgment I have formed be correct, and if I could have brought myself to agree with the inference my brethren have drawn from the letter of the 2nd of August, I most certainly should have done so. I have been unable, and am therefore unwillingly compelled to deliver this judgment.

Solicitors: *Downing, Holman & Co.*, agents for *Downing & Handcock, Cardiff; Batten, Proffitt, & Scott.*

H. C. J.

C. A. 1892 KEKEWICH, J. *Nov.* 25. C. A. *Nov.* 30.

In re EVANS. EVANS *v.* NOTON.

[1891 E. 1506.]

Practice—Action—Non-appearance of Defendant—Examiner—Order on Defendant to attend as Witness—Party to Action—Contempt—Attachment—Filing Notice of Motion—Personal Service—Irregularity—Imprisonment—Discharge, Application for—Rules of Supreme Court, 1883, *Order* XLIV., *r.* 2; *Order* LXVII., *r.* 4; *Order* LXX., *r.* 1; *Order* LXXII., *r.* 2.

A Defendant to an administration action, who did not appear to the action, was ordered to attend before the examiner as a witness on the part of the Plaintiff on certain inquiries directed in the action. The Defendant having disobeyed that order and also a further order to attend at his own expense, the Plaintiff moved for and obtained an order for leave to issue a writ of attachment, under which the Defendant was imprisoned. The notice of motion on which the order was made was not served on

the Defendant personally, but was filed under Rules of Supreme Court, 1883, Order LXVII., rule 4:—

Held, that attachment and not committal was the proper course, and that the filing of the notice of motion for attachment was sufficient without personal service.

Semble, that the proceeding was not so far of a criminal nature as to make the order not appealable.

THIS action commenced by originating summons which was duly served on the Defendant *Noton*, the executor of *T. F. Evans*; but he never entered an appearance, and on the 1st of February, 1892, an order was made directing an inquiry of what the property subject to the trusts of the will consisted and how it was invested.

On the 4th of March, an order was made in Chambers that *Noton* should attend before the examiner in rotation at such place and time as he should appoint, and be examined on the part of the Plaintiff for the purpose of the inquiry directed by the order of the 1st of February, 1892. The summons on which this order was made was not served on *Noton*, but was filed under Order LXVII., rule 4. The examiner appointed the 15th of March. The order and notice of appointment were personally served on *Noton*; but he failed to attend, and the examiner adjourned the appointment that *Noton* might be served with a subpœna. A *subpœna duces tecum* was accordingly, on the 19th of March, served on him personally to attend on the 22nd of March; but he again failed to attend.

On the 25th of March, 1892, Mr. Justice *Kekewich* made, on motion, an order that *Noton* should attend at his own expense to be examined at such time and place as the examiner should appoint. The notice of motion for this order was not served; but was filed under Order LXVII., rule 4.

The examiner appointed the 11th of April, and the order and notice of appointment were duly served on *Noton* personally on the 5th of April; but he again failed to attend.

On the 29th of April, 1892, Mr. Justice *Kekewich* made, on motion, an order giving the Plaintiff leave to issue a writ of attachment against *Noton* for his contempt in not having attended before the examiner. The notice of motion was not served, but was filed under Order LXVII., rule 4.

C. A. 1892 *In re* EVANS. EVANS *v.* NOTON.

An attachment was forthwith issued, but *Noton* kept out of the way, and at last on the 2nd of November, 1892, he was arrested under it and lodged in *Holloway Prison.*

On the 15th of November, *Noton* gave notice of motion that he might be discharged from custody, and that the attachment might be discharged, on the ground that no notice of motion for leave to issue it was served on him.

The motion was heard before Mr. Justice *Kekewich* on the 25th of November, 1892.

C. Hemery Lindon, for the motion:—

The order for the issue of the writ of attachment was irregular, the notice of motion on which the order was made not having been served personally; filing the notice under Order LXVII., rule 4, being, I submit, insufficient. It is true that, in *In re Morris* (1), it was held that filing the notice was sufficient service under the rule, the defendant not having entered an appearance; but that was a case in which the defendant had been ordered to pay a sum of money into Court, whereas here the order disobeyed was an order made against the Defendant to attend for examination merely in his character of a witness, and not as a party to the action. There is a difference in procedure between the two cases, and I submit that in such a case as the present, a notice of motion of this kind must be served personally, according to the old practice which is preserved by Order LXXII., rule 2. Not having appeared to that action, I am virtually in the position of a stranger, in which case the proper process should have been by committal and not by attachment: *In re Bell's Estate* (2).

The Court has jurisdiction under Order LXX., rule 1, to set aside a proceeding for irregularity: *Petty* v. *Daniel* (3); *Oswald* on Contempt (4): and I submit the order for attachment was clearly irregular through the failure to effect personal service of the notice of motion on which it was made.

Ingpen, for the Plaintiff:—

The Defendant, being a solicitor, is an officer of the Court, and

(1) 44 Ch. D. 151.
(2) Law Rep. 9 Eq. 172.
(3) 34 Ch. D. 172.
(4) Pages 110, 154.

therefore especially bound to obey its orders. When I applied for and obtained the order for attachment, I expressly called your Lordship's attention to *In re Morris* (1) as an authority for filing the notice of motion in default of appearance by the Defendant.

[He was stopped by the Court.]

KEKEWICH, J.:—

This being an application for the discharge of a prisoner, it is right that there should be no doubt, not only as to my opinion, but as to the grounds of it. The Defendant, *Noton*, is in prison under an order made on the 29th of April last because he had committed a contempt of Court in not attending before the examiner appointed to take evidence in the action. He is a solicitor; being an officer of the Court, he was bound, therefore, if possible more than any other person, to obey an order of the Court to attend before the examiner. It appears he had ample opportunity of attending the appointments, and there has been no attempt to say that every indulgence was not extended to him. I will assume he was ordered to attend merely as a witness and not as a defendant. As at present advised, I do not see that that makes the slightest difference.

It is said that the order for the writ of attachment was made irregularly; that is to say, that the service of the order was not personal, and was only effected by filing the notice of motion in the central office. Possibly that may have been wrong. That was called to my attention by Mr. *Ingpen* when he moved for the order. The Defendant did not appear before me on the motion, it may have been because he was not aware that the motion was coming on, though there was the fact that he had deliberately disobeyed the order for his examination. But it is said that the order was irregular, and that without personal service of the notice of motion I ought not to have made the order. I will assume that there is much to be said in favour of that view; but no authority for that was cited on behalf of the Applicant which appeared to be in point, and it has been already decided that an order once made is not void, but that

(1) 44 Ch. D. 151.

C. A. 1892 *In re* EVANS. EVANS *v.* NOTON. Kekewich, J.

it can be set aside or otherwise dealt with at the discretion of the Court: that is to say, if the Court is satisfied, not only that the order ought not to have been made according to the strict practice, or that practically the man ought not to have been in prison at all or that he should be released, then the Court will exercise its discretion in his favour.

The case I refer to is *Petty* v. *Daniel* (1), in which Mr. Justice *Kay* reserved judgment to consider the practice; and it is clear he considered the point, for he said (2) that the application in that case to discharge a prisoner for contempt was "on the ground that the evidence used in support of the motion for attachment was never properly served." There is not much distinction between that case and the one I have here. Mr. Justice *Kay* came to the conclusion (3) that an irregularity had been committed, and he considered whether the Court could condone the irregularity, and he came to the conclusion that it was competent to the Court to condone an irregularity of that kind; and in short he held that the order for attachment was not void, "but (4) there has been an irregularity in obtaining it, and therefore under Order LXX., rule 1, the Court may set it aside, or amend, or otherwise deal with it in such manner and upon such terms as the Court shall think fit." Acting on that power, he did not set aside the order, but exercised the discretion conferred upon him, and ordered the Applicant's release from prison.

I hold, with Mr. Justice *Kay*, that this order is not void. How, then, ought I to exercise my discretion? A solicitor who was summoned to attend before the examiner did not attend. An opportunity was given to him to attend, but he did not avail himself of the opportunity, and an order was made that he should attend at his own expense. The solicitor again failed to attend. The only alternative was to send him to prison: no other course could have any effect upon him, and he comes precisely within the words of Mr. Justice *Kay*: "Much has been said to me about the liberty of the subject, but I have not much respect for the liberty of a subject who deserves to be in prison."

(1) 34 Ch. D. 172.
(2) Ibid. 177.
(3) 34 Ch. D. 179.
(4) Ibid. 181.

In my opinion the Applicant in the present case deserves to be in prison, and I leave him there. I refuse the motion, with costs.

G. I. F. C.

Noton appealed from this decision. The appeal was heard on the 30th of November, 1892.

C. Hemery Lindon, for the Appellant:—

I submit that the order for leave to issue attachment was wrong as having been made without notice. The witness has no doubt, under Order XXXVII., rule 8, been guilty of contempt of Court, and the proceedings are quasi criminal proceedings, so that strict regularity is necessary.

[LINDLEY, L.J.:—If the proceedings are criminal no appeal will lie: *Judicature Act*, 1873, sect. 47.]

An appeal was entertained in *Davis* v. *Galmoye* (1).

[A. L. SMITH, L.J.:—What sort of crime do you call it?]

A misdemeanour, as was laid down by Mr. Justice *Mathew* in the case of *In re Davies* (2). *In re Pollard* (3) also supports our view.

[BOWEN, L.J., referred to *O'Shea* v. *O'Shea* (4).]

There are cases where service has been held sufficient, though not personal: *Browning* v. *Sabin* (5); *In re A Solicitor* (6); *In re Morris* (7); but all these were cases where, under the old practice of the Court of Chancery, an attachment would have been issued as of course by the Clerks of Records and Writs without any application to the Court. The present application is more in the nature of committal than attachment: *Callow* v. *Young* (8). The necessity of notice is shewn by *Blackstone's* Commentaries (9); *Broom's* Legal Maxims (*Audi alteram partem*) (10). In the case of a motion to commit it is necessary to serve the

(1) 39 Ch. D. 322.
(2) 21 Q. B. D. 236, 238.
(3) Law Rep. 2 P. C. 106.
(4) 15 P. D. 59.
(5) 5 Ch. D. 511.
(6) 14 Ch. D. 152.
(7) 44 Ch. D. 151.
(8) 56 L. J. (Ch.) 690; 55 L. T. (N.S.) 543.
(9) Vol. iv. p. 286.
(10) 6th Ed. p. 106.

C. A. 1892 *In re* EVANS. EVANS *v.* NOTON.

party personally: *Mander* v. *Falcke* (1). In the cases where service of notice for attachment otherwise than personally has been held sufficient, there has been service on the solicitor, or an attempt to serve the party personally. Here there could be no service on the solicitor, for *Noton* not having appeared was not a party to the cause, and so could not have a solicitor.

[BOWEN, L.J.:—If a person keeps out of the way to avoid service, is not that a case where the Court would authorize another form of service; and if service had been effected in some other way without leave, would it not be within the power of the Court to ratify it?]

If there is no difficulty in effecting personal service it will be required, though it will be dispensed with if the parties cannot be found: *Richards* v. *Kitchen* (2). Here it is evident that he could have been found, for several orders were served on him personally. The Plaintiff did not try to serve him with the notice of motion for leave to attach, but relied on Order LXVII., rule 4.

Then I contend that, as against a stranger to the action, the remedy for contempt is by committal not by attachment: *In re Bell's Estate* (3).

[LINDLEY, L.J.:—It seems rather a strong thing to say that a person named as Defendant in an action and served is a stranger to it.]

I contend that he is not a party but a stranger until he has entered an appearance.

[LINDLEY, L.J.:—In *Harvey* v. *Harvey* (4) an attachment for non-delivery of deeds was held so far a criminal proceeding that the sheriff could break open an outer door to execute it. Does not this put a difficulty in the way of your appeal?]

I rely on *Davis* v. *Galmoye* (5) as shewing that an appeal will lie.

[THE COURT referred to *O'Shea* v. *O'Shea* (6) as shewing that some contempts might be criminal and others not.]

(1) [1891] 3 Ch. 488.
(2) 25 W. R. 602.
(3) Law Rep. 9 Eq. 172.
(4) 26 Ch. D. 644.
(5) 39 Ch. D. 322.
(6) 15 P. D. 59.

The present comes within the class of cases mentioned by *Cotton*, L.J., as having nothing of a criminal nature in them, processes to get something done in the action. The writ of attachment could not, under the old practice before the consolidated order, have been issued, it would have been a case for committal, the Appellant not being a party to the cause. If attachment is now a proper course, it is, in a case like the present, a mere substitute for committal, and ought to be subject to the same checks. Now, from time immemorial, personal service of a notice to commit has been necessary: *Nelson* v. *Worssam* (1). [*Daniell's* Chancery Practice (2) was also referred to.] By Order XLII., rule 7, an order to do an act other than payment of money may be enforced by committal or attachment, *i.e.*, by committal in cases where that is the appropriate remedy, and by attachment in other cases; it does not mean that in any case either remedy may be applied. [*Treherne* v. *Dale* (3) was also referred to.]

Ingpen, for the Plaintiff:—

In re Morris (4) justifies us in having filed the notice of motion, instead of serving it, and is a direct authority in my favour. The passage in *Daniell* which has been referred to stongly tends to shew that any order of a nature analogous to this could be made *ex parte* under the old practice.

[LINDLEY, L.J.:—But now, under Order XLIV., rule 2, it must be upon notice.]

Yes; but Order LXVII., rule 4, makes the filing the notice of motion equivalent to service, so that the Defendant has had sufficient notice: *In re Morris*; and it appears from Mr. *Lavie's* certificate, furnished to one of the judges, that the practice has been in accordance with that decision (5). Under

(1) W. N. (1890) 216.
(2) 5th Ed. p. 804.
(3) 27 Ch. D. 66.
(4) 44 Ch. D. 151.
(5) By kind permission of Mr. Registrar *Lavie* this certificate is here inserted:—

Memorandum as to committal and attachment.

Attachment is directed to the sheriff, who lodges the prisoner in the county goal. Committal is executed by the tipstaff, who brings the prisoner up to the Court prison at *Holloway*, in

C. A. 1892

In re EVANS. EVANS *v.* NOTON.

Order LXX., rule 1, the judge has a discretion, and is not bound to discharge an order because it has been irregularly obtained:

whatever part of the country he may take him. The latter is probably the more expensive and less convenient practice, except where the person committed is actually present in Court. In such a case the tipstaff need not wait for the order to be drawn up, but can act on a memorandum signed by the Registrar (see Form I.).

This memorandum is handed to the tipstaff, who leaves it, on lodging the prisoner, with the keeper of the prison, and the order is subsequently drawn up and a copy sent to the keeper.

The tipstaff, who was formerly in attendance in the Lord Chancellor's Court, has now a room opposite to Appeal Court II., and he is bound to keep the Registrar's messenger informed where he is to be found.

If, however, he is not forthcoming, which is sometimes the case, the Court can appoint one of the ushers to take the prisoner. A memorandum is in such case signed by the Judge himself (see *Seton*, p. 1592).

If the person committed is not present in Court, the order has to be drawn up, passed, and entered, and is given by the solicitor to the tipstaff, who does not act upon the order till he has obtained the Lord Chancellor's warrant (see Form II.). This necessitates some delay, as the Lord Chancellor's own signature is required; but the tipstaff does not proceed without it, as he considers that he would not be entitled without it to call upon the bystanders to assist him in arresting the prisoner.

The difference between attachment and committal before the *Judicature Act* was well established. A man was committed for doing what he ought not to do, and attached for not doing what he was ordered to do. This distinction is, to a great extent, done away with by Order XLII., rule 7, under which a judgment which includes an order (see Order XLII., rule 24), requiring a person to do an act other than payment of money, or to abstain from doing anything, may be enforced by attachment or committal. But it is submitted that a large class of cases yet remains unaffected by this rule. As for example, where there is a breach of an undertaking, misconduct towards a ward, interference with a receiver, unjustifiable comment on a pending case, or what may be called personal contempt of the Court, as in the *Egg Case*, in none of which is there any enforcement of an order to do or to abstain from doing anything.

This point was suggested as regards a breach of undertaking in *Callow* v. *Young* (56 L. J. (Ch.) 690), where *Chitty*, J., had, on an affidavit of service of a notice for attachment made an order. His Lordship directed the case to be re-argued on the point whether committal or attachment was the proper remedy, and also on another point, to be referred to hereafter, as to the necessity of personal service of the notice of motion.

But counsel elected to serve a fresh notice rather than re-argue the point, and on the fresh notice the Defendant appeared.

It is submitted that the correct view is that these special contempts are still regulated by the old practice under which committal rather than attachment was the absolutely correct remedy; though attachment being considered less than committal it would, under the old practice, have

Petty v. *Daniel* (1); and it will not be discharged if justice will be done by keeping it on foot. If a man is in prison, and has been open to the person aggrieved to ask for an attachment rather than a committal.

The distinction is still important in reference to a question as to the necessity of personal service of the notice of motion, as to which, there is, I think, some misapprehension.

It must be borne in mind that where attachment was the proper remedy under the old practice, the attachment issued as a matter of course, without any order, on production to the proper officer of the order directing the act to be done and evidence of the default in doing it; but no one could be committed without an order for that purpose, which order was made either in cases where the offender was present in Court, or, if made on notice of motion, required personal service of such notice. The reason for this distinction probably was, that whether the person to be attached had or had not done what he was ordered to do, was a simple question of evidence; but that the question whether what he had done was or was not a breach of the order, was one for judicial determination, or, in other words, the contempt in the latter case had to be adjudicated.

By Order XLIV., rule 2, no attachment is to be issued without leave, to be applied for on notice to the party against whom the attachment is to be issued.

The question arose, whether a notice of motion now, for the first time, required by reason of this rule, was to be personally served, and in *Browning* v. *Sabin* (5 Ch. D. 511), the late Master of the Rolls decided that service of such notice in the manner pointed out for service of any other notice not requiring personal service was sufficient.

But it is submitted that this applies only to cases where before the rule the attachment would have issued without any adjudication of the contempt, and that the Master of the Rolls had no intention to alter the existing practice, which was not in question before him, but only to hold that the new rule did not involve the adoption of the old practice, that personal service was requisite when the result of the motion would be to affect the liberty of the subject.

This seems reasonable, as the intention being that the suitor should not have the power of imprisoning any one without the intervention of the Court, full effect could be given to this limitation of the rights of the suitor by allowing the notice, now for the first time rendered necessary, to be served on the solicitor, instead of imposing on the party aggrieved the burden of effecting personal service. But this did not necessitate any alteration in the practice which required personal service in all cases where it was necessary that the contempt should be adjudicated, and the leave of the Court was required before the attachment could be issued.

No one, I think, has yet contended that *Browning* v. *Sabin* (5 Ch. D. 511) applies to a notice to commit, and I do not see how the obligation of personal service can be got rid of merely by applying for an attachment

(1) 34 Ch. D. 172.

C. A. 1892

In re EVANS. EVANS *v.* NOTON.

clearly been guilty of contempt, I submit that the Court has jurisdiction to keep him there, though there may have been

instead of a committal in a case where committal was the remedy before the *Judicature Act*.

The true rule would appear to be that a motion for leave to issue an attachment which but for the Judicature rule the party moving would have been enabled to issue without leave, does not require to be personally served, but that a notice of motion for leave to issue an attachment which the party moving could never have issued without leave, requires as before the Act to be personally served.

The *Debtors Act* requires, perhaps, separate notice. The six weeks' committal under sect. 5 is not the same as ordinary committal, but is executed by any sheriff or officer to whom it is directed by one of the Masters of the Supreme Court (see *Seton*, p. 1566), but the description "*Holloway*" *Prison* in the form is incorrect. There seems no doubt that the notice of motion for such an order would require personal service, but there may be some question as to a notice of motion for an attachment under the *Debtors Act*. It is not necessary to adjudicate the contempt, but it is necessary for the Court to be satisfied that the case is within the exceptions of the Act. So it may be considered not a case in which the attachment would have issued altogether as of course, but it is a case in which there could be no contest whether there had or had not been a breach of the order.

Browning v. *Sabin* (5 Ch. D. 511) was a case of payment into Court; but it was decided on the language of the Judicature rule, not with reference to the *Debtors Act*.

I have referred to the original order which it was there sought to enforce, and the language of it shews so clearly that the case was within the exceptions of the *Debtors Act*, that I think it may be assumed that under it an attachment would have issued without further order had it not been for the Judicature rule. But even if it be held that this case is a conclusive authority that personal service of a notice of motion for an attachment under the *Debtors Act* is not necessary, it is submitted that this apparent exception to what has been suggested as the true rule is more apparent than real. For it is not strictly accurate to say that the leave of the Court was required before the Judicature rule for the issue of an attachment under the *Debtors Act*.

The officer issuing the attachment would not take upon himself the responsibility of determining whether the particular case was within the exception of the *Debtors Act*, and required to have this stated on the face of an order, and the more convenient way of stating it, where it did not appear in the original order, might be by giving leave to issue an attachment.

But if the officer had issued the attachment without any such leave, and even without any such statement, the attachment could not have been set aside as it now might be on the ground that the leave of the Court to issue it had not been obtained. It would have been sufficient to shew in answer to an application to set it aside, that the case was in fact within the exception of the *Debtors Act*.

No second order was required if the original order for payment shewed clearly that the case was within the

some irregularity about his imprisonment. It is not like a case where a man finds himself in prison without knowing why. If a man has been personally served with an order, ordering him to do a definite act, disobeys it, and sets the Court at defiance, justice does not require that he should have had personal service

---

exceptions or had on the face of it a statement, "and this order may be enforced by attachment." This statement, however, did not mean "Liberty is hereby given to enforce this order by attachment"; but "This order is one which may, having regard to the provisions of the *Debtors Act*, be enforced by attachment."

It should also be noticed that, as pointed out by Mr. Justice *Chitty* in *Harvey* v. *Harvey* (26 Ch. D. 644), attachment for debt is not really process of contempt, but process of execution, which originally issued like any other process of execution as of course, and which in the cases excepted from the *Debtors Act* the suitor was still entitled to issue without leave until the Judicature rule.

In every case the notice of motion, whether personally served or not, must state in general terms the ground of the application, and the affidavits intended to be used on the hearing must be served together with the notice of motion, Order LII., rule 4. This will not, of course, include the affidavit of service of the notice of motion; but (notwithstanding the decision to the contrary of *Pearson*, J.) is considered to include all other affidavits which are necessary to establish the case for attachment, such as the affidavit of service of the order and of default.

The question of notice of motion only has been here dealt with, as the strong opinion expressed by the Court of Appeal in *Davis* v. *Galmoye* (39 Ch. D. 322) that such application in Chancery should not be made by summons, seems to render it unnecessary to discuss that course of procedure.

FORM I.

A. v. *B.* Date.

The defendant (name) is for contempt in disobeying an order made in this cause by Mr. Justice , on the day of committed to the custody of the keeper of Her Majesty's Gaol at *Holloway* to be kept in safe custody until the further order of this Court.

FORM II.

Lord Chancellor's Warrant
(after order to commit).

In the High Court of Justice,
Chancery Division.
Lord Chancellor
Mr. Justice

A. v. *B.*

Whereas, by an order made by his Lordship Mr. Justice in the above action bearing date the . It was ordered that the said defendant do stand committed to *Holloway Prison* for his contempt in the said order mentioned. These are therefore in pursuance of the said order to will and require you forthwith upon receipt hereof to make diligent search after the body of the said and wheresoever you shall find him to arrest and apprehend him and him safely convey to *Holloway Prison* there to remain until further order Willing and requiring all Mayors Sheriffs Justices of the Peace Headboroughs Constables and all other Her Majesty's loving subjects to be

C. A. 1892 *In re* EVANS. EVANS *v.* NOTON.

of the notice for leave to issue attachment. In some cases the General Orders provide for personal service, and there is no ground for implying it where they do not prescribe it. The orders do not prescribe personal service in this case, and the old practice cannot be appealed to, for under it an attachment would have been issued by the Clerks of Records and Writs without any order.

Lindon, in reply:—

Illness would be an excuse for non-compliance with any order. The Defendant may have been ill, and this shews it to be essential to justice that, before a man is committed to prison, he should have notice, that he may have an opportunity of explaining why he has not obeyed the order by attending before the examiner.

LINDLEY, L.J.:—

This case has been ingeniously argued by Mr. *Lindon*, but he has not persuaded me that the proceedings have been wrong, or that we ought to reverse the decision of Mr. Justice *Kekewich*. The Defendant, a solicitor, is the executor of a will, the Plaintiff is *cestui que trust* under that will, and the action is for the administration of the trusts. The Defendant has not appeared, and it has been contended that he therefore is not a party to the action; but I think that he became such when he was served. He not having appeared, steps were taken against him, an order for inquiries was made, and ultimately, on the 25th of March last, an order was made that the Defendant should attend at his own expense to be examined, at such time and place as the examiner should appoint. It is urged for the Defendant that this order was not made upon notice. It is true that he did not personally receive notice; but the notice was filed; and that

---

aiding and assisting to you in the due execution of the premises, as they tender Her Majesty's service, and will answer the contrary thereof at their peril, and this shall be to you and any of you who do the same a sufficient warrant.

Dated this day of in the year of our Lord 18

To Mr. *Amos Hawkins* the Tipstaff attending Her Majesty's High Court of Justice Chancery Division.

(Signed)

C. A. 1892 *In re* EVANS. EVANS *v.* NOTON. Lindley, L.J.

way of giving notice is authorized by Order LXVII., rule 4, where the party to whom notice is to be given has not appeared. The examiner appointed a time and place, and the order and notice of appointment were served on the Defendant personally. The Defendant failed to attend, and on the 29th of April Mr. Justice *Kekewich* made an order giving the Plaintiff leave to issue an attachment. No notice of motion for this order had been served on the Defendant personally; but the notice was filed pursuant to Order LXVII., rule 4, so that notice was given in the manner provided in cases other than cases in which personal service is required. Is this a case in which personal service was required? According to the practice of the Court of Chancery, if a man failed to obey a definite order to do an act, an attachment issued against him as a matter of course without any notice to him. This practice was altered by the *Judicature Acts* in two respects—an attachment cannot be issued without leave of the Court or a Judge, and such leave can only be obtained on notice to the party. These alterations are embodied in Order XLIV., rule 2, which says: "No writ of attachment shall be issued without leave of the Court or a Judge, to be applied for on notice to the party against whom the attachment is to be issued." This rule does not say that service of the notice is to be personal. We are left to the other rules to see how notice ought to be given; and this being an application for a writ which under the old practice would have issued without any order, I do not see any ground on which we can say that personal service is required. When the case came before Mr. Justice *Kekewich*, he found that the Defendant had not appeared, and that the notice had been filed under Order LXVII., rule 4; and his Lordship made the order for leave to issue an attachment. We are now asked to say that this order was made without jurisdiction. If the matter were clear of precedent, there would be much to be said in favour of the view that the service must be personal; for it seems a strong thing to put a man in prison without his having notice of the application. But, according to the General Orders, the practice is settled. Whether the rules ought to be altered, it is not for us to say.

I have dealt with the case on the assumption that an appeal

C. A. 1892 *In re* EVANS. EVANS *v.* NOTON. Lindley, L.J.

lies. But it is not clear whether the proceeding is of a criminal nature, in which case an appeal would not lie, or is purely civil: *O'Shea* v. *O'Shea* (1). I should myself say that it was not criminal. In *O'Shea* v. *O'Shea*, Lord Justice *Lopes* says (2): "There are different kinds of attachment for contempt. One kind of attachment is to enforce obedience to an order made in a civil action or proceeding, against one of the parties, in respect of something the doing or not doing of which is not a criminal act. That would not be an order in a 'criminal cause or matter' within 36 & 37 Vict. c. 66, s. 47. The case of *Reg.* v. *Barnardo* (3) is an example of that kind." But there are authorities which look the other way, as *In re Freston* (4); *Harvey* v. *Harvey* (5). I will not decide this point, but will leave it to be reconsidered when it becomes necessary to decide it.

BOWEN, L.J.:—

I also will assume that an appeal lies, and will consider the case on its merits, whether according to the true view the order appealed from is wrong. I will not go through what the Lord Justice has dealt with. The practice is correctly stated in *Howarth* v. *Howarth* (6), and in Mr. *Lavie's* report. The *Judicature Acts* have altered the practice as to writs of attachment, and the question to what extent is it altered depends on Order XLIV., rule 2, assuming the present case to come under the category of attachment, and not of motion to commit. The Defendant was ordered to attend before an examiner. This was a proceeding in a suit to compel him to do something for the purposes of the suit, and I cannot see any such difference as was urged in argument between such an order and an order to pay money into Court. If a party to a suit is ordered to do anything, and he omits to do it, that is a case for attachment. In *Howarth* v. *Howarth* the Court of Appeal held that personal service was not indispensable, and the same was held in the Chancery Division in *In re Morris* (7). Order XLIV., rule 2, does not prescribe

(1) 15 P. D. 59.
(2) Ibid. 65.
(3) 23 Q. B. D. 305.
(4) 11 Q. B. D. 545.
(5) 26 Ch. D. 644.
(6) 11 P. D. 95.
(7) 44 Ch. D. 151.

personal service, it only requires notice, leaving it to be gathered from the other orders what mode of giving notice is required. I should prefer to have had it enacted by the rules that leave to issue an attachment should not be given without personal service of notice on the party, or such substituted service as the Court might direct. But the rule does not provide this, it only directs that the application must be on notice to the party. How is this notice to be given? Order LXVII., rule 4, provides that, "where no appearance has been entered for a party . . . , all writs, notices, . . . , and written communications in respect of which personal service is not requisite may be served by filing them with the proper officer." I should, if the point were entirely new, have felt some little hesitation in deciding that Order LXVII., rule 4, applies where the liberty of the subject is in question; but when I find a course of practice established, and a decision on the point in *In re Morris* (1), I cannot say that there was not here a sufficient service within the rules. It must be observed that this decision need not lead to any abuse, for in every case the leave of the Court has to be obtained, and the Court can in any case where notice has only been filed require further notice to be given, if it thinks such a course desirable for the furtherance of justice. Justice is obviously satisfied in this particular case by leaving the Defendant in gaol, but we construe the rules without any reference to that. The appeal will be dismissed.

A. L. SMITH, L.J.:—

I agree, and have but little to add. In my judgment this is a proceeding rightly taken by way of attachment and not by way of committal, it being a step to compel a party to a cause to obey an order made in the cause. Under the old practice of the Court of Chancery, a writ of attachment would have been issued in such a case as of course, and without any notice at all to the party. This practice has, however, been altered by the rules under the *Judicature Acts*, and the question is, has the Applicant duly followed these rules? Order XLIV., rule 2, now puts the judge between the applicant and the party sought to be

(1) 44 Ch. D. 151.

C. A. 1892 *In re* EVANS. EVANS *v.* NOTON. A. L. Smith, L.J.

attached, by providing that no attachment shall issue without leave of the Court or a Judge to be applied for on notice to the party. Is it necessary that the service of this notice for attachment should be personal? I do not find anything in the rules to say that it is; and, this being so, Order LXVII., rule 4, as to the way in which service of this notice is to be effected, applies, and this rule has been complied with. The Defendant is, therefore, rightly in gaol, and must stay there.

As to the question whether this is an appealable order, I think that it is; but it is unnecessary to decide that point, as we dismiss the appeal upon the other ground.

Solicitors: *R. B. Horman-Fisher; Hopgoods & Dowson.*

H. C. J.

C. A. 1892 *Dec.* 14.

STRONG *v.* CARLYLE PRESS.

[1892 S. 3868.]

Company—Winding-up—Appointment of Receiver for Debenture-holders.

On the 30th of September a creditor's petition to wind up a company was presented, and on the 10th of October the Official Receiver was appointed provisional liquidator. On the 11th of October the debenture-holders of the company, whose charge extended over all the property of the company, and whose interest was in arrear, commenced an action to enforce their security; and on the 14th of October a receiver was appointed on their application, with power to manage the business until the winding-up petition was disposed of. On the 25th of October a winding-up order was made, and the Official Receiver was continued as provisional liquidator. On the 28th of October leave was given to the Plaintiffs to go on with their action; and on the same day the receiver was continued, with power to manage the business. On the 24th of November, on the application of the Plaintiffs, leave was given to discontinue the business. The liquidator thereupon applied to discharge the receiver, and *Vaughan Williams*, J., considering that, as the business was discontinued, the reason for his appointment had ceased, discharged him. It appeared that there was no uncalled capital, and that the assets of the company were not enough to pay the debentures:—

Held, on appeal, that the order discharging the receiver must be reversed, for that the debenture-holders, whose interest was in arrear, had a right to a receiver, which right was not taken away by the winding-up, and that

the receiver ought not to be displaced without some strong reason for doing so.

A case having been fully argued by counsel before a Judge in Chambers, an appeal from the order in Chambers was heard, though the Judge had not certified that he did not require further argument.

C. A.
1892
STRONG
v.
CARLYLE PRESS.

IN September, 1891, a printing and publishing company was registered under the name of the *Carlyle Press, Limited.*

By the memorandum and articles the directors were empowered to issue such debentures, and to affix the seal of the company to such trust deed as hereafter mentioned.

The directors, under their powers, issued 200 A debentures of £100 each, and 200 B debentures of £100 each.

By each A debenture the company covenanted to pay £100, and the interest thereon, and declared that the registered holder was entitled *pari passu* with the holders of the other A debentures to the benefit and was subject to the provisions of the trust deed of the 4th of February, 1892, mentioned below, and the company charged with the said payments all and such part of its undertaking and property, present and future, as was not effectually charged by the deed of trust, including book debts and uncalled capital, and on each A debenture was a provision that it was one of a series of 200 A debentures, and that all the debentures of that series should rank as a first charge. By each B debenture the company covenanted to pay £100, and interest, and charged with such payments its undertaking, and all its property present and future, including uncalled capital (subject to the A debentures), and on each B debenture was a condition that it was one of a series of 200 B debentures of £100 each, and that all the debentures of that series should rank as a second charge *pari passu.*

By a deed of trust dated the 4th of February, 1892, made between the company of the first part, the Plaintiffs of the second part, and *W. Burgess* of the third part, the company demised to the Plaintiffs certain leaseholds for the residue of the respective terms for which they were holden, except the last day of such terms respectively, and certain other leaseholds were declared to be held by *W. Burgess* in trust for the Plaintiffs. And the company conveyed to the Plaintiffs all its undertaking and all its

C. A. 1892 — STRONG v. CARLYLE PRESS.

property (except leaseholds) both present and future (including book debts, *choses in action*, and uncalled capital). And it was declared that the Plaintiffs should stand possessed of all the premises upon the trusts therein set forth, being trusts to secure payment of the principal and interest on the A debentures.

The £20,000 of A debentures were issued to the Plaintiffs on the same 4th of February, and the £20,000 B debentures were issued to one *William Booth* on the 22nd of September, and subsequently became vested in the Plaintiffs, who became the registered holders of all the A and B debentures.

On the 30th of September, 1892, a creditors' petition to wind up the company was presented, and on the 10th of October the Official Receiver was appointed provisional liquidator.

On the 11th of October, the Plaintiffs commenced this action to enforce their security by foreclosure or sale; and on the 14th of October, 1892, an order was made in the action appointing *A. B. Russell*, until after the winding-up petition was disposed of or until further order, to receive on behalf of the debenture-holders all the property and assets of the company comprised in or subject to the charge created by the debentures and the trust deed, and to manage the business of the company, the Plaintiffs undertaking to provide the moneys necessary for carrying it on up to the 21st of October.

On the 25th of October, 1892, a compulsory winding-up order was made, and the Official Receiver was continued as provisional liquidator.

On the 28th of October, 1892, an order was made in the winding-up giving the Plaintiffs liberty to proceed with their action.

On the same 28th of October, an order was made by Mr. Justice *Chitty* in the action appointing *A. B. Russell* to receive on behalf of the Plaintiffs, the debenture-holders, all the property and assets of the company comprised in or subject to the trust deed of the 4th of February, 1892, and in the securities and charges created by the debentures, and to manage the business of the company, with a proviso that he was not to act as manager for more than six months from the date of the order without leave of the Judge in Chambers. The receiver was to be at liberty to advance moneys for current expenses up to £5000.

The action was shortly afterwards transferred from Mr. Justice *Chitty* to Mr. Justice *Vaughan Williams*, before whom the winding-up was carried on.

The business of the company consisted in a great measure of the printing and publishing periodicals. The proprietors of so many of these publications withdrew their business from the company that the receiver found he could not carry on the business at a profit. The Plaintiffs thereupon applied that the receiver might be at liberty to discontinue the business on or before the 1st of December, 1892, and to relinquish possession of such part of the company's leasehold properties as was not required for realization of the assets. On the 24th of November, 1892, leave to discontinue the business was given, with liberty to apply as to the leaseholds. The Registrar, by whom the application was heard, said that there must not be two officials employed to get in the assets, and directed the solicitors of the Official Receiver to take out a summons to remove Mr. *Russell* from being receiver, and to appoint the Official Receiver in his place.

On the same 24th of November, 1892, the summons was taken out accordingly.

Mr. *Russell*, by affidavit, stated that the leaseholds of the company were held at a rack-rent, and had no saleable value, and that the assets, to his belief, would not realize more than £14,600. He further stated, as the result of inquiries he had made, that there was no unpaid and no uncalled capital of the company. The Plaintiffs deposed that £20,000 with an arrear of interest was due to them on the A debentures, besides what was due on the B debentures.

The application was heard in Chambers by Mr. Justice *Vaughan Williams*, who, after full argument by counsel, made an order discharging the receiver and directing him to pass his final account, the order to be without prejudice to such application, if any, as the Plaintiffs might be advised to make. His Lordship said that Mr. *Russell* appeared to have been appointed for the purpose of managing the business, for which he had special qualifications, and that as the business had come to an end he ought to be discharged.

C. A.
1892
STRONG
v.
CARLYLE PRESS.

The Plaintiffs appealed.

Crackanthorpe, Q.C., and *Beddall*, for the appeal.

Ribton, for the company, took the preliminary objection that the order having been made in Chambers by Mr. Justice *Vaughan Williams* as an additional Judge of the Chancery Division, the application to discharge it ought not to be to the Court of Appeal, but to himself in Court, unless he certified that he did not desire further argument, which he had not done.

Crackanthorpe, Q.C., for the Appellants:—

The case was argued by counsel on both sides at considerable length before the Judge in Court, though technically he was sitting in Chambers, and it would have been idle to ask him whether he desired further argument.

[The Court overruled the objection.]

Crackanthorpe, Q.C., and *Beddall*, for the Appellants:—

The debenture-holders were in possession by their receiver, appointed by an order of the Court, and the order now under appeal ousts them. This is inconsistent with the authorities. *In re Henry Pound, Son, & Hutchins* (1), and *In re Joshua Stubbs, Limited* (2), shew the principles applicable to the case. The Court will not in general appoint the liquidator in place of the receiver unless there are outstanding assets of such a nature that the liquidator can by the machinery of the *Companies Acts* get them in more economically and quickly than a receiver can do. There is in the present case nothing to be got in except some book debts, which the receiver can get in as well as a liquidator, and there is really nothing for the liquidator to do. The book debts are included in our securities, and the whole assets are not sufficient to satisfy our claim. The present order leaves the liquidator to take possession of property the equity of redemption in which is worthless.

Ribton, for the Defendants:—

Mr. *Russell* was appointed receiver for the purpose of carrying

(1) 42 Ch. D. 402. (2) [1891] 1 Ch. 475.

on the business of the company. The Official Receiver could not carry it on as the unsecured creditors would not advance money for the purpose. The business has been dropped, and the only reason for appointing Mr. *Russell* ceases, and a person of his high qualifications is not wanted for the mere purpose of getting in assets. If the order of Mr. Justice *Vaughan Williams* stands, the Plaintiffs are at liberty to apply for the reappointment of Mr. *Russell*, and it would be open to the Judge to call for further evidence as to what was given for the debentures.

[KAY, L.J., referred to the observations of *James*, L.J. in *In re David Lloyd & Co.* (1) as to the rights of a mortgagee where there is a winding-up.]

This is not the ordinary case of a mortgagor and mortgagee. In an ordinary case the facts are within the knowledge of the mortgagor; but it is quite different when the mortgagor is a company and the parties substantially interested subject to the mortgage are the unsecured creditors.

[LINDLEY, L.J.:—If we affirm this order, the result will be that the assets will be vested in the liquidator. Is not that sacrificing the rights of the mortgagees?]

If the Plaintiffs can shew that cash was given for these debentures, they will get their own receiver.

[KAY, L.J.:—Then your case is that you wish to contest the Plaintiffs' title, and in the meantime to get hold of the assets to fight the Plaintiffs with what *primâ facie* is their own money.]

The Judge has thought it proper, having regard to the circumstances under which Mr. *Russell* was appointed, that his appointment should not stand; but the Plaintiffs have leave to apply for his reappointment, and submit that this order should not be interfered with.

LINDLEY, L.J.:—

I think the learned Judge has made a mistake in this case, and I understand and appreciate the view which led to it. His

(1) 6 Ch. D. 339.

C. A. 1892 STRONG v. CARLYLE PRESS. Lindley, L.J.

object was to save expense—that was the object; and this is one of those mistakes which might have been foreseen as likely to arise in consequence of the transition state in which we are as regards winding-up and the transfer of debenture-holders' actions to the Court of the Judge who is winding up companies under the Act of 1890. But, with all deference to the learned Judge, I think he has not given due effect to the rights of mortgagees.

The mortgagees here are *primâ facie* the holders of valid mortgages; they claim under deeds which at present are not impeached. On the face of them they appear quite regular, and there is no reason at present for saying that they are in any degree invalid. Under those circumstances, the mortgagee says, "My interest is in arrear. I want a receiver." If he holds valid debentures and his interest is in arrear, he is entitled to a receiver, and he has got an order for a receiver. Now, the fact that the mortgagor is a company, which has since been ordered to be wound up, does not in any way affect the rights of the mortgagees. The learned Judge who is entrusted with the winding-up is quite right in endeavouring to keep down expense, and I thoroughly appreciate his view, which is, "We do not want two people to wind up this company and to apply the assets in payment of the creditors." That is quite true; but who under those circumstances is the person to do it? Surely it is the receiver of the mortgagees, unless there is some sufficient reason to the contrary. Here I think the learned Judge has omitted *per incuriam* to give effect to the rights of the mortgagees as distinguished from the rights of unsecured creditors.

I do not regard the Official Receiver as having any right at all except so far as he is an officer of the Court and has rights conferred by statute in the winding-up. He has nothing to do with it except as such officer. What the learned Judge has done is, that he has simply discharged the receiver of the mortgagees. The practical result of that will be that there is no receiver for the mortgagees, and all the assets will be collected and realized by the liquidator under the control, no doubt, of the learned Judge. He might by this order have given directions to protect the mortgagees, but he has not done so. It now appears from the remarks of Mr. *Ribton* that what is at the bottom of the

matter is this—the unsecured creditors want to find out some reason for upsetting the Plaintiffs' security. I think it would be rather strong that the mortgagor should be able to do that at the expense of the mortgagees. I think we ought to discharge this order; and the Appellants must have their costs both here and below from the liquidator, who must get them in the best way he can.

LOPES, L.J.:—

Primâ facie in this case the title of the debenture-holders, the mortgagees, appears to be complete, and therefore in this case, like any other case of mortgagees, they appear to me to be entitled to a receiver unless something is made out to shew that they are not so entitled; and it is to be observed in this case that there are no calls for the provisional liquidator to make, and there are no outstanding assets. The case, therefore, is very similar to the case of *In re Henry Pound, Son, & Hutchins* (1). If the receiver of the mortgagees is discharged, in this case there will be no receiver at all for the mortgagees, and, so far as I can see, they will not be protected. I think, therefore, this appeal ought to be allowed with costs.

KAY, L.J.:—

I agree. The mortgagees in this case, the debenture-holders, on the 14th of October obtained an order for the appointment of a receiver until a pending petition to wind up the company, who were the mortgagors, was disposed of. On the 25th of October, the winding-up order was made. On the 28th, there was an application to continue the receiver notwithstanding the winding-up order, and that was ordered by the Judge before whom this debenture-holders' action came. The receiver was continued, but was not to act for more than six months without leave of the Judge. Then, on the 3rd of December, the provisional liquidator under the winding-up order applied to discharge the receiver. At present there is no impeachment at all of the mortgage deed, and, as we are told, it is uncontested that the whole of the assets of this company are not worth more

(1) 42 Ch. D. 402.

C. A. 1892 STRONG v. CARLYLE PRESS. Kay, L.J.

than £14,600, and the mortgage debt is £20,000 and upwards. Therefore, if the mortgages are good, every farthing of this company's property belongs to the mortgagees, the debenture-holders. Why that property should be taken from their receiver and handed over to the liquidator, I really, with deference, am unable to imagine. Mr. *Ribton* has suggested, on behalf of the liquidator, that there may be some ground for contesting these debentures. Observe what that comes to. The mortgagor wants to contest the validity of the mortgage; at present he has not taken any step whatever to do so, but he says, "Let me have possession of the assets which *primâ facie* belong entirely to the mortgagee in order that, having those assets in my hands, I may contest the validity of the mortgage." I asked Mr. *Ribton* whether he had ever heard of such a thing being done in all the history of the Court of Chancery. Certainly I never did. At present the mortgagor has not taken any step whatever to contest the validity of the mortgage; but he says, "I want to have possession of the mortgage property in order that I may the more easily be able to contest the validity of the mortgage." Does not the argument come to that? I think we must follow the course this Court took in the case of *In re Henry Pound, Son, & Hutchins* (1), and the observations made in the later case of *In re Joshua Stubbs, Limited* (2). We must treat the mortgagees as being persons entirely outside the winding-up. They have rights with which the winding-up ought not to be allowed to interfere, and, having properly obtained the appointment of a receiver, it is impossible to allow that receiver to be displaced and the liquidator in the winding-up to be put in his place. One of the reasons mentioned in the case of *In re Joshua Stubbs, Limited*, applies especially here. If these assets are put in the possession of the liquidator, there will be some costs incurred in the winding-up with which the mortgagees have nothing on earth to do; and the liquidator then will try, and I suppose *primâ facie* will have a right, to retain those costs out of the assets which belong entirely to the mortgagees. Anything more unfair than that cannot possibly be imagined. Here the mortgagees have rightly got their receiver, and there seems to

(1) 42 Ch. D. 402. (2) [1891] 1 Ch. 475.

me to be no ground for displacing him. They have taken possession of the property which is theirs, they being creditors entirely outside the winding-up; and I think, with great deference to the learned Judge, this is the very case in which the mortgagees' receiver ought not to be displaced. I therefore think this order must be reversed, with the costs of the appeal and the costs below.

C. A. 1892 STRONG v. CARLYLE PRESS.

Solicitors: *Clapham & Fitch; Piesse & Son.*

H. C. J.

EARL POULETT *v.* VISCOUNT HILL.

C. A. 1892 Dec. 14.

[1892 P. 2189.]

Foreclosure Action—Subsequent Action for Arrears of Interest—Liquidated Sum—Rules of Supreme Court, 1883, *Order* III., *r.* 6; *Order* XIV.

Mortgagees commenced in May, 1891, an action claiming payment of the principal and interest, an account of what was due, foreclosure, and a receiver. In June the equitable tenant for life of the mortgage money was appointed in the action to be receiver of the rents of the mortgaged property, with directions authorizing him to retain the arrears of interest and the current interest out of the rents. The rents were insufficient to pay the current interest. The action had not yet been tried. In September, 1892, the Plaintiffs commenced a second action against the mortgagor, indorsing the writ for a definite sum, being the amount of two years' interest from August, 1890, less the amount of rents received, and they applied for immediate judgment under Order XIV. *Kekewich*, J., ordered payment:—

Held, on appeal, that as, according to the form of order settled in *Farrer* v. *Lacy, Hartland & Co.* (1), a mortgagee in a foreclosure action obtains a personal order for payment of the principal with interest down to the date of the certificate, the money to be recovered in the second action could be recovered in the first, and that the second action, therefore, was improperly brought:

Held, also, that the case did not come within Order XIV.; for that as the receiver was receiving the rents with liberty to retain the interest out of them, there was no liquidated sum for which the writ could be indorsed under Order III., r. 6.

The order for payment was, therefore, discharged.

ON the 26th of May, 1891, Earl *Poulett* and others, as mortgagees, commenced an action, *Earl Poulett* v. *Viscount Hill* (1891

(1) 31 Ch. D. 51.

C. A. 1892 — EARL POULETT v. VISCOUNT HILL.

P. 1223), in which they claimed payment of £34,612, secured by a mortgage executed by the Defendant, Viscount *Hill*, together with interest, an account of what was due, foreclosure in default of payment, a receiver, possession of the mortgaged premises, and an injunction against cutting timber. The Plaintiffs had advanced the money as trustees of a settlement, and the security had turned out unsatisfactory. On the 15th of June, 1891, an order was made appointing *Vere Somerset*, the tenant for life under the settlement, receiver, with special directions authorizing him to retain the arrears of interest and the current interest out of the rents. On the 29th of January, 1892, an order was made in Chambers for sale of the mortgaged property. The pleadings were closed; but at the time of the proceedings forming the subject of the present report, notice of trial had not been given. The rents proved insufficient to keep down the interest. On the 22nd of February, 1892, *Vere Somerset* and his children, the *cestuis que trust* under the settlement, commenced an action of *Somerset* v. *Earl Poulett*, against the trustees to make them personally liable for improper investment. On the 3rd of June, 1892, Mr. Justice *Kekewich* made an order for a receiver of the principal moneys and interest payable under the mortgage, with liberty to the receiver to apply for the conduct of proceedings in *Poulett* v. *Hill* (1891 P. 1223). On the 13th of July, 1892, the Court of Appeal, on the trustees undertaking to take such proceedings as they might be advised were necessary and proper to recover payment from Lord *Hill* of the arrears of interest when ascertained, discharged this order, the costs of the trustees to be their costs in any event.

The trustees, on the 20th of September, 1892, commenced the present action against the mortgagor. The writ was specially indorsed for £1106 18*s.* 3*d.* This sum was made out as follows: two years' interest on the mortgage from the 24th of August, 1890, less income tax, £2699 14*s.* 8*d.*, from which was deducted £1592 16*s.* 5*d.*, the amount of rents in the hands of the receiver, together with a small sum of purchase-money received from sale of a portion of the mortgage property, leaving a balance of £1106 18*s.* 3*d.*

The Plaintiffs applied in Chambers under Order XIV. for im-

mediate judgment for that sum; and the Defendant applied to stay the action as vexatious. The applications were heard together, and on the 14th of November, 1892, Mr. Justice *Kekewich* ordered Lord *Hill* to pay the £1106 18*s.* 3*d.* The Defendant moved to discharge this order; and on the 2nd of December, 1892, Mr. Justice *Kekewich* dismissed the motion with costs.

The Defendant appealed.

Warrington, for the appeal:—

I contend that this action cannot be maintained.

[LINDLEY, L.J.:—You do not dispute that you owe the money. Why should you not pay it?]

The Defendant ought not to be harassed by a separate proceeding for an amount included in what is to be recovered in the former suit. It was decided by Mr. Justice *North* in *Farrer* v. *Lacy, Hartland & Co.* (1) that the Plaintiff in a foreclosure suit is entitled to an order for personal payment of what is found due on taking the account of principal and interest, the interest being computed to the date of the certificate, and this was affirmed by the Court of Appeal (2), where the forms of order approved by the Court are given. What the Plaintiffs seek to recover here would be included in the amount for which they will have an order for personal payment in the other action, and it would lead to great oppression if a plaintiff was allowed to commence a second action for the purpose of obtaining speedier payment of a part of what is to be recovered in his original action. Moreover, this case does not come within Order XIV.; for, as the rents are being received on behalf of the Plaintiffs, and are to be applied in payment of interest and arrears, the amount due is a fluctuating sum, and not a liquidated sum as required by Order III., r. 6. This order, therefore, ought to be discharged.

Carson, for the trustees:—

We were put under an undertaking in *Somerset* v. *Earl Poulett* to take such proceedings as we might be advised were necessary and proper to recover the arrears of interest, and we have taken

(1) 25 Ch. D. 636. (2) 31 Ch. D. 42.

C. A. 1892 — EARL POULETT v. VISCOUNT HILL.

the only course which appeared to be open. It was important to the tenant for life to have the interest paid, and the rents are insufficient to pay it. The proceedings in the second action will not be stayed unless they are vexatious—which, under the circumstances of this case, they clearly are not.

[LOPES, L.J. :—What answer would you have had if you had been met by the old plea of a pending action ?]

As to the other objections, a liquidated sum was due when this action was commenced, and, as the rents are less than the interest, the amount then due could not be diminished by the receipt of rents. This is a mere endeavour on the part of the Defendant to delay payment of what is justly due.

LINDLEY, L.J. :—

In this case the learned Judge has made a mistake which is attributable to a wish to save costs. On the 26th of May, 1891, the Plaintiffs commenced against the Defendant an action for foreclosure, and by the writ they claimed not only foreclosure but also, as the practice has been since the passing of the *Judicature Acts*, a personal order for payment. Under that writ an account of what is due would be directed—an account which, being taken on the footing on which such accounts were always taken in Chancery, would include interest down to the date of the certificate, and an order would be made for personal payment of the amount found due. Before the *Judicature Acts* a personal order for payment could only be obtained by bringing a common law action, in which interest could only be recovered down to the date of the writ, and a personal order for payment of the subsequent interest could only be obtained by a fresh action ; but now that a personal order can be obtained for payment of what is found due on taking the account, such second action is unnecessary. In *Farrer* v. *Lacy, Hartland & Co.* (1) the form of judgment is given which was settled by the Court of Appeal. Whether this particular point was present to the mind of the Court is not quite clear ; but a general form was settled giving a personal order for payment of what was found due for principal

(1) 31 Ch. D. 42, 51.

and interest on taking an account, so that the necessity for a subsequent action for interest is taken away. The Plaintiffs then could in the first action have obtained a personal order for payment of all that was due to them for principal and interest, and the present action is unnecessary. If we were to affirm the order under appeal our decision would lead to bringing improper and vexatious actions; and, though I believe that the attempt to recover in the present action was well meant, it was a mistake.

I am further of opinion that this is not a case for the application of Order XIV.; for, having regard to the receipt of rents by the receiver, the amount claimed was not a liquidated sum within the meaning of Order III., rule 6. The order must be discharged with costs.

LOPES, L.J.:—

A fusion of law and equity has taken place, and, according to *Farrer* v. *Lacy, Hartland & Co.* (1), it is clear that the Plaintiffs can obtain in the first action everything to which they are entitled, yet they bring a second action. This second action is unnecessary. Under the old practice a plea of abatement of a pending action would have been a perfectly good plea to the present action, all the relief sought in the second action being covered by the first. The order must be discharged.

KAY, L.J.:—

I am of the same opinion. The form in *Farrer* v. *Lacy, Hartland & Co.* (2) runs thus: "The Court doth order and adjudge that the following account be taken—(1.) An account of what is due to the plaintiff for principal and interest under the defendant's covenant to pay contained in the indenture of mortgage dated ——. And it is ordered that the plaintiff do recover against the defendant the amount which shall be certified to be due to him on taking the said account, and also so much of his costs of this action as would have been incurred if it had been brought for payment only, such costs to be taxed by the Taxing Master." The reason is obvious: the Court now having jurisdiction to make a personal order for payment, wished to make

(1) 31 Ch. D. 42. (2) 31 Ch. D. 51.

C. A. 1892 — EARL POULETT v. VISCOUNT HILL. — Kay, L.J.

the different parts of the order consistent by giving the same amount of principal and interest under the covenant as would be found due on taking the account for ascertaining what must be paid to avoid foreclosure, thus making it unnecessary to bring a second action for arrears of interest when no second action is wanted to obtain foreclosure. The object was to make successive actions unnecessary. I think that it was quite within the power of the Court to adopt this form of order, for it is a mere matter of procedure. The strong ground for making orders in this form being to prevent multiplicity of actions, it is most improper, after a foreclosure action has been commenced, to bring a second action for arrears of interest. According to the old practice, the plaintiff could have brought an action every half-year for payment of half a year's interest; and if we sanctioned the order now under appeal, we should be sanctioning a revival of that practice. When an action has been brought by which the plaintiff can recover everything to which he is entitled, he ought not to bring another. Moreover, this second action includes some interest which had become due before the issue of the writ in the first action. The second action is wrong in every way. The Plaintiffs, too, were wrong in supposing that Order XIV. could be resorted to. A receiver being in receipt of the rents, the writ could not, under Order III., rule 6, be properly indorsed for a liquidated sum. The order will be discharged with costs.

Solicitors: *Stibbard, Gibson & Co.*, agents for *Rowlands & Co., Birmingham; Hulberts & Hussey.*

H. C. J.

In re PERKINS. PERKINS *v.* BAGOT.

NORTH, J.
1892
Oct. 25, 26.

[1892 P. 874.]

Power—Exercise—Validity—Condition attached—Fraud on Power.

Under the will of her father a testatrix had power to appoint a fund among her children or remoter issue. In default of appointment the fund was to go to her children in equal shares at twenty-one or marriage. She had two sons and two daughters. By her will, which recited the power, and stated that she had appointed the greater part of the fund in favour of her daughters, and that the only part remaining unappointed was a sum of £713 Consols, she, in exercise of the power, appointed the £713, and all other the trust moneys over which she had a power of appointment under her father's will, to her sons in equal shares, on condition that they should give up all claim to the proceeds of the sale of the furniture in a house formerly occupied by her, and sign a release to her executors in respect of all claims to any portion of the produce of the sale of the furniture within three months after her death. But, in the event of their making any claim to the furniture, or the produce of the sale thereof, or refusing, neglecting, or declining to give such release to her executors within the time specified, then she appointed the £713, and the trust funds thereinbefore appointed, to one of her daughters absolutely. She bequeathed the residue of her estate to a person who was not an object of the power. Besides the £713, there was, in fact, a further sum of £934, which the testatrix had not previously appointed. The furniture to which she referred had been bequeathed by her deceased husband to herself for life, with remainder to her sons in equal shares. Power was given to her to sell it; but, if she did so, the proceeds of sale were to be held on the same trusts. She had sold the furniture for about £700, and had received the proceeds of sale, so that her sons had a claim against her estate for those proceeds.

There was no evidence that the appointment was made in pursuance of any bargain between the testatrix and her sons, or that the sons knew of the appointment before her death:—

Held, that the appointment could not be severed from the condition; that it was made for the purpose of increasing the estate of the testatrix for the benefit of the residuary legatee by the amount of the claim which her sons had against her; that it would not have been made but for this; and that, consequently, the appointment was void *in toto* as a fraud on the power.

ORIGINATING SUMMONS by the trustees of the will of *Henry Perkins*, who died on the 15th of April, 1855, asking for

NORTH, J. 1892 *In re* PERKINS. PERKINS *v.* BAGOT.

the determination by the Court of (*inter alia*) the following question arising in the administration of the testator's estate, viz., whether an appointment contained in the will of the testator's daughter, *Matilda Bagot*, of a sum of £713 10s. 10*d.* Consols (over which she had a power of appointment under her father's will), in trust for her two sons, *Ponsonby Bagot* and *Villiers Spencer Bagot*, on a condition in her will mentioned, was a valid and effectual appointment, and, if it was valid, whether it was subject to or freed and discharged from the condition.

By the will of *Henry Perkins*, dated the 6th of December, 1851, his trustees were directed after the death of Mrs. *Bagot* to stand possessed of one equal third part of certain trust moneys, stocks, funds, and securities therein mentioned, and the annual income thereof, in trust for all and every or such one or more exclusively of the others or other of the children or more remote issue of Mrs. *Bagot* (such more remote issue to be born in her lifetime), and with such provisions for their respective maintenance, education, and advancement, at such age, day, or time, or respective ages, days, or times, not exceeding the period of twenty-one years from her death, and, if more than one, in such parts, shares, and proportions, and with or subject to such annual sums of money and limitations and conditions for the benefit of or relating to the said children or issue or some or one of them, and generally in such manner as Mrs. *Bagot*, whether covert or sole, should by deed or will as therein mentioned, at any time or times direct or appoint. And in default of and until such direction or appointment, and so far as no such direction or appointment should extend, in trust for all and every the children or child of Mrs. *Bagot* who (whether in her lifetime or after her decease), being a son or sons should attain the age of twenty-one years, or being a daughter or daughters should attain that age, or marry under that age, which should first happen, and, if more than one, in equal shares, and if there should be but one such child, the whole to be in trust for that one child.

The will of Mrs. *Bagot* (then a widow), dated the 5th of March, 1881, contained a recital of the power of appointment, and a further recital that she had appointed the greater part of the trust fund in favour of her two daughters, Mrs. *Bernal*, since

deceased, and Mrs. *Paton*, respectively, and that the only part of the fund then remaining unappointed consisted of a sum of £713 10*s.* 10*d.* Consols. The testatrix then, in pursuance and exercise of the power to her given by the said will of her father, and of all other powers and authorities enabling her in that behalf, did thereby "direct or appoint that the said sum of £713 10*s.* 10*d.* Consols, being the unappointed share of the trust funds over which I have a power of appointment as aforesaid, and all other the trust moneys, stocks, funds, and securities hereinbefore mentioned or referred to, and over which I have a power of appointment under the will of my said father as aforesaid, and which have not been appointed by me as aforesaid, shall from and after my decease be held by the trustees or trustee for the time being of the said will of my said father, upon trust for my sons *Ponsonby Bagot* and *Villiers Spencer Bagot* in equal shares share and share alike, on condition that they give up all claim to the proceeds of the sale of the effects in the house at *Dover* formerly occupied by me, and sign a release to my executors in respect of all claims to any portion of the produce of the sale of the said furniture within three calendar months after my decease. But, in the event of their making any claim to the said furniture or the produce of the sale thereof, or refusing, neglecting, or declining to give such release to my executors as aforesaid, within the time specified, then I direct and appoint that the said last-mentioned sum, and the trust funds hereinbefore appointed or intended so to be, shall be held" in trust for Mrs. *Paton* absolutely.

The testatrix also bequeathed a moiety of a third part of a sum of £100,000, to which third part she was entitled for her separate use under the will of her brother, to *Charles Edward Ormerod*, absolutely for his own use and benefit. She also bequeathed to him all the residue of her estate absolutely for his own use and benefit.

Ormerod was not an object of the power of appointment. He was bailiff to the testatrix. The furniture referred to in the will had, by the will of the husband of the testatrix, been bequeathed to her for her life, with remainder to her two sons in equal shares. Power was given to her to sell the furniture, but,

NORTH, J.
1892
In re PERKINS. PERKINS *v.* BAGOT.

if she did so, the proceeds of sale were to be held on the same trusts as the furniture. Mrs. *Bagot* in her lifetime had sold the furniture, and had received the proceeds of sale, amounting to about £700; and, therefore, her sons had at the time of her death a claim against her estate for that £700.

Though the testatrix stated in her will that £713 10*s.* 10*d.* Consols was the only part of the trust fund remaining unappointed, there was, in fact, a further sum of £934 remaining unappointed. The testatrix died on the 4th of July, 1889. Her only children were the two sons and the two daughters named in her will. The sons both survived her. Mrs. *Bernal* died on the 21st of April, 1877, and Mrs. *Paton* died on the 11th October, 1888. A settlement was made on the marriage of Mrs. *Paton*, which contained a covenant to settle after-acquired property. No settlement was made on the marriage of Mrs. *Bernal*.

The Defendants to the summons were the two sons of the testatrix; the trustees of Mrs. *Paton's* settlement; Mr. *Bernal*, as representing the estate of his deceased wife; and Colonel *Paton*, as representing the estate of his deceased wife.

Coltman, for the Plaintiffs, stated the facts.

J. W. Clark, for the two sons:—

The appointment to the sons is good, but the condition is void, and they take the fund free from the condition. The condition can be severed from the appointment: *Alexander* v. *Alexander* (1); *Sadler* v. *Pratt* (2); *Watt* v. *Creyke* (3). This is not like *Hay* v. *Watkins* (4), in which the condition was not severable. It is not suggested that there was any bargain between the testatrix and the sons, or that they knew what she intended to do.

Bramley, for the trustees of Mrs. *Paton's* settlement:—

The appointment is void altogether; it is a fraud on the power. It was not made for the purpose of benefiting the sons, but in order that the proceeds of the sale of the furniture might

(1) 2 Ves. Sen. 640.
(2) 5 Sim. 632.
(3) 3 Sm. & Giff. 362.
(4) 3 D. & War. 339.

go to the residuary legatee. It would not have been made at all but for the condition. The material question is, what was the motive for making the appointment: *Duke of Portland* v. *Topham* (1). *Sadler* v. *Pratt* (2), amounts only to a *dictum*, for the children of the first marriage took just in the same way as they would have taken in default of appointment.

Sebastian for the Defendant *Bernal*:—

Scroggs v. *Scroggs* (3), and *Daubeny* v. *Cockburn* (4), are authorities shewing that the appointment is void *in toto*. The sons cannot accept the gift without entering into a bargain to fulfil the condition, and that would be a fraud on the power.

[NORTH, J.:—That is quite a different thing from an antecedent bargain, and it is admitted there was no antecedent bargain.]

In re Marsden's Trust (5) shews that the ignorance of the appointee is immaterial. The power has been exercised merely for the purpose of benefiting a stranger: *Whelan* v. *Palmer* (6).

Clark, in reply, referred to *In re Crawshay* (7); *Roach* v. *Trood* (8).

NORTH, J. (after reading so much of the clause in the will by which the testatrix exercised the power of appointment as preceded the condition, continued):—

It happens that, besides the sum of Consols, which the testatrix states was the only part of the trust fund then remaining unappointed, there was a further sum of £934 which had not been appointed, and the words of the will are sufficient to carry that £934. But the fact remains that the testatrix thought that she was disposing of that sum of £713 10*s.* 10*d.* Consols alone. If the clause had stopped at the point down to which I have read there could be no question that the appointment to the sons would be perfectly good. But then follow words which

(1) 11 H. L. C. 32.
(2) 5 Sim. 632.
(3) 1 Amb. 272.
(4) 1 Mer. 626.
(5) 4 Drew. 594.
(6) 39 Ch. D. 648.
(7) 43 Ch. D. 615.
(8) 3 Ch. D. 429.

NORTH, J. 1892 *In re* PERKINS. PERKINS *v.* BAGOT.

impose a condition on the sons. [His Lordship then read the condition and the gift of the residue to *Ormerod*, and stated the facts as to the furniture, and continued:—] The result is that the sons had a claim against their mother's estate for the proceeds of sale of the furniture, which were almost equal in amount to the sum of Consols which she appointed by her will. The effect of the will as it stands is, that the testatrix had given the sum of Consols to her two sons upon the express terms that they should give up the claim for a sum of nearly equal amount which they had against her estate. The result was that her residuary estate would be increased by that amount. In other words, the purpose of the appointment was to enlarge her residuary estate by releasing it from a claim of equal amount which her sons had against it. It appears to me impossible to say that in such circumstances the appointment to the sons is good, while the condition attached to it is void. I cannot in any way sever the condition from the appointment. The real object of the testatrix, in making the appointment, was to give a sum of equal amount to a person who was not an object of the power. This was an abuse of the power—what is called a fraud upon the power. I do not mean to suggest that the testatrix had any fraudulent intention, but she was exercising the power in a manner which was not authorized by its terms. I think the case of *Alexander* v. *Alexander* (1) shews that the present appointment is void. In that case a mother had power to appoint by will a sum of £6000 among her children. There being five children living she made her will, in which she recited the power, and in pursuance thereof she gave to her daughter *Anne* £100, and she gave to her daughter *Mary* and her son *James* each one-fourth part of the remainder, and to them also the other two-fourth parts; but, as to one of the latter fourth parts, upon trust to pay the income, during the life of their sister *Catherine*, to such person or persons as she should from time to time direct, and in default of such direction to herself, and upon trust at her decease to pay the principal of such fourth part to such child or children, if any, as she should have living at her decease, as she should appoint, and

(1) 2 Ves. Sen. 640.

for default of such appointment to her children. In default of such children, then the principal of that fourth part, if she survived her husband, to be paid to her; but, if she should die in his life, the principal at her death to go to *James* and *Mary*, yet for their own respective benefit only as to one-third part thereof to each of them; and as to the other third part thereof, and also as to the other of the two remaining fourth parts, upon trust to pay and apply the principal and interest thereof, or any part of either from time to time, in such manner as *Mary* and *James* should in their discretion think most beneficial for the personal support and maintenance of their brother *Francis* and his wife and children. It was held that the exercise of the power, so far as it concerned other persons than the children of the testatrix, was void and of no effect. The material passage in the judgment is this. Sir *Thos. Clarke*, M.R., said (1): "The execution of a power may be good and bad in part: but the consequence of this will be various, as the circumstances of the cases are. As suppose a power to a man to appoint £1000 among his children; he appoints £100 among the children, and £200 among others who are strangers: the appointment of the £900 will be so absolutely void, as that it will not be prevented from going over, if limited over for want of appointment, as if he had made none; and something of this has happened in this case, or may happen as to *Catherine*. On the other hand, if the father gives the whole £1000 to his children, and annexes a condition, that they shall release a debt owing to them, or pay money over, the appointment of £1000 would be absolute; and the condition would be only void: and the boundaries between the excess and proper execution are precise and apparent. The ground and principle of all this is, that where there is a complete execution of a power, and something *ex abundanti* added, which is improper, there the execution shall be good, and only the excess void: but where not a complete execution of a power, where the boundaries between the excess and execution are not distinguishable, it will be bad." He then gives some illustrations which I need not read, and he adds: "If the Court can see the boundaries, it will be

(1) 2 Ves. Sen. 644.

NORTH, J.
1892
In re PERKINS.
PERKINS *v.* BAGOT.

good for the execution of the power, and void as to the excess." Applying these observations to the present case, I do not see how I can draw any distinction between the exercise of the power and the excess. There is not a complete exercise of the power with something *ex abundanti* added, but there is an absolute condition annexed. It is quite clear to me that the power would not have been exercised at all except for the purpose of increasing the estate of the testatrix for the benefit of a person who was not an object of the power.

Two other cases were relied on in support of the validity of the appointment, but they seem to me quite distinguishable. The first is *Sadler* v. *Pratt* (1). In that case a lady, having four children by her first husband, and three by her second, and having power to appoint a fund among the former only, appointed it amongst all her children equally, and directed that they should receive their respective shares at the age of twenty-five. And she directed that, in case any one of her children by her first husband should object or refuse to share the trust property with her children by her second husband, the child so refusing should not have any part of the trust property, and in case all her children by her first husband should refuse, then she bequeathed the whole of the trust property to her youngest child by her first husband, except £1500, which she bequeathed to a daughter by her first husband. Vice-Chancellor *Shadwell* held that the appointment was not wholly void, but that the children of the first marriage took thereunder each one-seventh of the fund, and that the other three-sevenths went to them as in default of appointment and that the direction for payment at twenty-five was *ex abundanti*, and might be rejected. But the appointment was made to all the seven children, and there was not the slightest reason for saying that the gift to the four children of the first marriage was not good. There was an attempt to secure to the three children of the second marriage the three-sevenths which the testatrix had not appointed to the children of the first marriage. There was no interference with the appointment of the four-sevenths to children of the first marriage, except to the extent of making that

(1) 5 Sim. 632.

appointment void in case they should refuse to share the property with the children of the second marriage. It was only an attempt *ex post facto* to make the former appointment void. The three-sevenths were really left unappointed. The gift over in the event of all the children of the first marriage refusing to share with those of the second marriage could not take effect, because two of those four children were infants.

The other case, *Watt* v. *Creyke* (1), bears some resemblance to the present case. In that case a testator, having a power of appointing a trust fund among his children, appointed parts of it to certain of his children, and he appointed the residue thereof to one child, and he directed that every child or grandchild who should become entitled to such residue should effectually settle the same upon the same trusts as he had declared of his own residuary estate, these being trusts for investment in freehold estates, to be settled to uses in strict settlement. It was held by Vice-Chancellor *Stuart* that the appointment was valid, but that the condition was void. A clear distinction could be drawn between the appointment and the subsequent direction to settle. Vice-Chancellor *Stuart* said (2): "Cases may occur in which the appointment may be so vitiated, by circumstances of fraud, or an underhand bargain, or an underhand undertaking, that the Court will treat those circumstances as vitiating the whole appointment. But, in the present case, the condition is honest and *bonâ fide*." In the present case it was attempted to argue that some bargain between the testatrix and the appointees ought to be inferred; I can see no evidence of anything of the kind. But in my opinion the testatrix made the appointment for the purpose of increasing the amount of her own personal estate for the benefit of her residuary legatee, and on this ground I hold that the appointment is void *in toto*, and that the fund goes as in default of appointment.

Solicitors: *Marson & Son; Dunster & Chapman.*

(1) 3 Sm. & Giff. 362.

(2) 3 Sm. & Giff. 368.

W. L. C.

NORTH, J.
1892
Nov. 2.

In re GODDEN.
TEAGUE *v.* FOX.

[1889 G. 586.]

Tenant for Life—Income—Mortgage—Colliery in Possession.

A testator gave his residue to trustees to convert (with power to postpone conversion) and to pay the income to tenants for life. Part of the testator's estate at his death consisted of a mortgage debt secured on a colliery in his possession; interest was in arrear. After the testator's death his trustees foreclosed. Proceeds of working the colliery come to the hands of a receiver in the foreclosure action were transferred to the credit of an action to administer the testator's estate:—

Held, that the funds in Court were apportionable between capital and income, on the principle that so much as would, if invested at the testator's death at 4 per cent. with annual rests, have amounted to the sum transferred at the date of transfer should be treated as capital and the rest as income.

THIS was a summons in an action for the administration of the estate of *William Godden*, who died in 1887, having made a will, dated October, 1885, by which he gave his real and personal estate, not otherwise disposed of, to the executors and trustees of his will, in trust for sale and conversion into money, and after payment of funeral and testamentary expenses, debts, and legacies thereout, he directed his trustees to hold the residue as his residuary estate. After certain provisions for his wife and sons, he directed that, as to so much of his residuary estate as should not be required for the purposes aforesaid, his trustees should divide the same into as many equal shares as the number of his daughters—*Mary Ann Hoar Moyle*, the wife of *Hamlyn Moyle*; *Kate Moyle*, the wife of *Alfred Moyle*; *Rosetta Jane Walker*, the wife of *George Walker*; *Lilian Alice Annie Godden*; and *Edith Monica Godden*—who either died in his lifetime leaving a child or children living at his death, or who survived him, and one such share should be allotted in respect of each such daughter. He directed that the share so to be allotted in respect of each such daughter who should survive him should be held in trust to pay the income thereof to such daughter for life, without

power of anticipation, and after her death on the trusts therein mentioned. The will contained the following provision: "My trustees or trustee may postpone during such period as they or he may deem expedient the sale, collection, and conversion of all or any part of my real and personal estate, including any leasehold hereditaments, or other property of a perishable or terminable nature, or any policy of assurance or reversionary interest, or shares in any mining or other company, or adventure, or partnership business, and the income to arise from such part of my real and personal estate as shall for the time being remain unconverted shall be applied and dealt with in manner hereinbefore directed with regard to the income of the moneys produced by such sale, collection, and conversion, and the income of my estate shall be treated as income as from my death, and my trustees or trustee may from time to time demise or lease any hereditaments forming part of my estate, or the mines or minerals thereunder, except surrenders of leases, and generally deal therewith, with all the powers of a tenant for life under the *Settled Land Act*, 1882, or any statutory modification thereof, and in all respects as they or he shall think fit, and generally may manage the same as if they or he were acting on their or his own account."

The testator's five daughters mentioned in his will were all married, and had issue. A part of the testator's personal estate consisted of a mortgage debt, secured on *Aran Hill Colliery, Glamorganshire*. The testator entered into possession in June, 1885, before the date of his will, and remained in possession and worked the colliery till his death. A large amount of interest was then in arrear. Shortly after the testator's death, his trustees commenced an action to foreclose the colliery. A receiver of the colliery was appointed in the foreclosure action. Under orders of the Court made in a former administration action, part of the testator's income-producing property was applied in the expenses of working the colliery. The receiver from time to time paid into Court, to the credit of the foreclosure action, sums received in respect of the working of the colliery. An order was made in that action for foreclosure absolute in December, 1891. The sums standing to the credit of the foreclosure action were

NORTH, J.
1892
In re GODLEN.
TEAGUE *v.* FOX.

transferred to the credit of this action in January, 1892. There was now in Court to the credit of this action a sum of £5689 14*s.* New Consols, representing the sums paid into Court by the receiver in respect of the working of the colliery previously to the date of foreclosure, and interest.

This was a summons taken out by the Plaintiffs, one of the testator's daughters and her husband, asking for distribution of the sum in Court among the testator's five daughters as tenants for life.

By consent of all parties the summons was treated as a summons for directions as to how the sum in Court ought to be appropriated.

S. Hall, Q.C., and *Stock*, for the Plaintiffs, and *Badcock*, *Vernon R. Smith*, and *Willis Bund*, for other tenants for life:—

The proceeds of the mine was income of the testator's estate, to which the tenants for life were entitled.

If in an ordinary case a tenant for life would not be entitled to the whole of such income, in this will there is a clause empowering the trustees to postpone conversion of wasting or other property, and expressly declaring that profits and incomings are to be treated as ordinary income; that clause, we submit, gives the tenants for life the proceeds of the coal-mine.

Method and *Clydesdale*, for persons entitled in remainder:—

The principle on which the moneys coming into a trust estate out of property subject to mortgage to the estate in arrear, has been settled by a series of authorities. The incomings, whether in the nature of income of the mortgaged property, or the proceeds of part of the property in the nature of capital, are to be apportioned between income and capital of the trust estate by finding what sum must be accumulated at 4 per cent. interest at the time of the creation of the trust (the testator's death in this case), to produce the sum received at the time of receipt. The sum so found is treated as capital, the balance as income: *In re Foster* (1); *In re Ancketill's Estate* (2); *Cox* v. *Cox* (3); *In re*

(1) 45 Ch. D. 629. (2) 27 L. R. Ir. 331.
(3) Law Rep. 8 Eq. 343.

Earl of Chesterfield's Trusts (1); *Gow* v. *Forster* (2); *In re Tinkler's Estate* (3).

Ingle Joyce and *Bramwell Davis*, for the trustees.

S. Hall, in reply:—

The cases cited do not apply, because they relate to cases where there was a deficiency as to the debt and interest, and were cases, therefore, in which it had to be ascertained in what proportion a loss was to be borne; while in this case it may turn out that the whole of the principal will be recovered; that being so, the tenants for life are entitled to be paid what is the actual income of the property.

NORTH, J.:—

I do not see my way at all to dividing this fund at present, because I am not, upon this summons, administering the estate; but as the parties have taken the view that all other questions of income are adjusted excepting with respect to the share, whatever it may be, of the tenants for life in this fund, I am prepared to deal with this as if it were a separate fund, and make a proper order for division of it on the footing that everything else is already adjusted.

The application is by the tenants for life to have the whole fund. That is what they ask, and nothing else. That seems out of the question. The facts are these:—The testator, before the date of his will, became mortgagee in possession of a certain mining property. The mortgage had been made some time before, but he did not enter into possession till some months before the date of his will; he remained in possession till his death, and for some time after his death his trustees remained in possession until a date was reached, when they absolutely foreclosed the mortgagor, and from that time forward the property became part of the testator's estate, as distinguished from what had been part of his estate before, namely, the debt due from the mortgagor to the mortgagee. The security, the mine itself,

(1) 24 Ch. D. 643. (2) 26 Ch. D. 672.
(3) Law Rep. 20 Eq. 456.

NORTH, J.
1892
In re GODDEN.
TEAGUE *v.* FOX.

belonged to the testator's estate in this sense, that the trustees of the estate had a charge upon it by way of security, but that did not make the mine itself part of the testator's estate.

The question arises as to money received by the receiver down to the time of absolute foreclosure, and does not include any money received by him in respect of proceeds or profits of working after that date of absolute foreclosure. There is also some accumulation of interest on the sums paid in. The question is in what way these must be applied. The interest is to some extent in arrear, but the tenants for life say that under a clause in the testator's will they are entitled to have the whole of the profits arising from the working of the mine as part of the income of the testator's estate. In my opinion it is not so at all. [His Lordship read the clause of the will above set out, and proceeded :—]

The debt due on the mortgage security did not produce any income, and they cannot therefore under that clause be entitled to anything in the shape of income. But, inasmuch as they are tenants for life of the testator's estate, and what was due on the mortgage forms part of the testator's estate, they are entitled to have some allowance in respect of interest at 4 per cent. on the calculated amount of what the testator's property is. I think, therefore, this clause does not help them in the least; but there being this estate, which is realisable by the testator's executors, they are entitled to have the income upon it. First of all, though it really is last of all in point of date, there have been certain sums in Court arising from income of the fund invested. It seems to me that those sums belong to the tenants for life. As to the rest of the fund, it must be divided between the persons who are creditors in respect of the money on account of which these payments were made, and these payments were made in respect of what was due on account of the mortgage; and the proper way to divide it, if this were an isolated fund, is to say that you must ascertain how much of it would be required to make up with 4 per cent. upon that sum the total amount now available for division; in other words, ascertain what capital sum would, with interest thereon at 4 per cent., make up the whole. The result would be that the fund would have to be

divided as the funds were divided in the cases referred to by Mr. *Methold*. Mr. *Hall* attempts to distinguish those cases on the ground that they were cases in which the whole fund had been realised and was going to be distributed and there was a deficiency; whereas, in the present case, the mine has not yet been realised, and it is as yet impossible to say whether, when realised, it will turn out to be sufficient to satisfy all that is due in respect of it. I do not think that criticism is accurate on all the cases cited, but even if it were it makes no difference, because we have to deal with the fund now available, and that fund is admittedly insufficient to provide in full for the claims in respect of capital and income; and as it is insufficient to provide for the whole, all we can do is to divide it as far as it will go in the same proportions as it would have been divided in if there had been exactly sufficient to satisfy the claims in full. The rest I hope will be paid hereafter; but I see no reason why the insufficient fund should not be divided as far as it will go in the same way as the whole fund would now have been divided if it had been sufficient. If it should turn out hereafter that there is sufficient to pay the parties in full there is no reason why the distribution of the present fund should be postponed. If there is not sufficient the reason for postponing it is itself displaced.

I think the proper order is to ascertain how much of this fund has arisen from the accumulations in Court of the moneys paid into Court by the receiver; then, as to the rest of the fund, ascertain what, down to the time the fund was paid into Court, was due for capital and interest respectively calculated as I have mentioned; and then take this sum and apportion it in the way it would have been apportioned if it had been principal and interest.

1893. Jan 25. On minutes it was directed that the order should follow the form of that in *In re Earl of Chesterfield's Trusts* (1).

Solicitors: *Coode, Kingdon, & Cotton; Crowder, Vizard & Co.; Rowcliffes, Rawle & Co.; W. E. Aldis; J. E. Fox & Co.*

(1) 24 Ch. D. 643.

D. P.

NORTH, J.

1892

Nov. 22.

DUKE OF NORTHUMBERLAND *v.* PERCY.

[1891 N. 1817.]

National Debt Conversion—Perpetual Rent-charge—Option to Redeem by Transfer of Specified Amount of "£3 per Cent. Annuities"—Right to substitute New 2¾ per Cent. Annuities—National Debt (Conversion) Act, 1888 (51 & 52 *Vict. c.* 2), *s.* 21, *sub-s.* 1; *s.* 25, *sub-s.* 2.

The Plaintiffs, by a deed executed in 1871, created a perpetual rent-charge of £10,000 a year, for the benefit of the first Defendant. The deed provided that the Plaintiffs should be entitled at any time to redeem the rent-charge by transferring to the trustees thereof a specified amount of "£3 per Cent. Annuities." In 1888 the *National Debt (Conversion) Act* was passed:—

Held, that, by virtue of sect. 25, sub-sect. 2, of that Act, the Plaintiffs were entitled to redeem the rent-charge by transferring to the trustees the specified amount of 2¾ per Cent. Stock created under the Act.

TRIAL OF ACTION.

The question for decision arose upon the construction of the *National Debt (Conversion) Act*, 1888.

By a deed dated the 22nd of July, 1871, certain lands and hereditaments described in a schedule were, in exercise of a power vested in the Duke of *Northumberland* and Earl *Percy*, his eldest son, appointed by them to the uses, upon and for the trusts, intents, and purposes, and with, under, and subject to the powers, provisoes, declarations, and agreements thereinafter limited and declared of and concerning the same, viz.: To the use and intent that *J. F. Campbell* and Lord *Hatherton*, their heirs and assigns, if Lord *Algernon Percy* should attain the age of twenty-one in the lifetime of the Duke, and *Louisa*, Duchess of *Northumberland*, should not survive the Duke, might from and after the decease of the Duke for ever thenceforth receive the perpetual rent-charge of £10,000, to be issuing and payable out of the hereditaments comprised in the schedule, with usual powers of distress and entry for the better securing of the due and punctual payment of the same; and, subject and charged as thereinbefore mentioned, to the use of the Marquis of *Lorne* and *E. S. Talbot*, their executors, administrators, and assigns, for the

term of 500 years, to commence from the death of the Duke, upon trusts for the better securing the payment of the rent-charge.

And it was declared that *J. F. Campbell* and Lord *Hatherton*, and the survivor of them, &c., should stand seised or possessed of the perpetual rent-charge of £10,000 and the powers of distress and entry thereinbefore limited to them, upon trust, if Lord *Algernon Percy* should survive the Duke and should then have attained twenty-one, to pay the same unto Lord *Algernon* and his assigns for his life, and if he should survive the Duke, and die after having attained twenty-one, then from and immediately after the decease of Lord *Algernon*, or, if he should attain twenty-one and die in the lifetime of the Duke, from and immediately after the death of the Duke, to pay the rent-charge, or so much thereof as should not have been appointed or charged by Lord *Algernon* and made payable, under or by virtue of the exercise of the powers of jointuring and charging portions thereinafter given to him, unto the first and every other son of Lord *Algernon* successively in tail male, with remainder upon trust to pay the same unto Earl *Percy*, his heirs and assigns, for ever. And Lord *Algernon* was empowered to charge the rent-charge of £10,000 with a jointure for any wife he might marry, to any amount not exceeding in the whole £2000 per annum, and with portions for his younger children to the amounts therein mentioned. And it was declared that if the Duke and Earl *Percy*, or the survivor of them, or any Duke of *Northumberland* for the time being, should at any time or times at their or his own expense transfer into the names of the trustees for the time being of the rent-charge any sum or sums of 3 per Cent. Annuities of any description, not being less in any one transfer than £3,333 6*s.* 8*d.*, and should declare that such transfer was made in or towards satisfaction of the rent-charge of £10,000, then and from thenceforth the rent-charge should be reduced and abate to the extent of £100 a year for each sum of £3,333 6*s.* 8*d.*, which should be so transferred. The stock transferred was to be held upon trust to convert the same into money, and to invest the money in the purchase of land, to be settled to uses and with powers corresponding as nearly as might to the trusts

NORTH, J.
1892
DUKE OF NORTHUMBERLAND v. PERCY.

and powers thereinbefore declared and expressed of the rent-charge, and in the meantime the dividends of the sum of £3 per Cent. Annuities transferred should be paid to the person or persons who for the time being would be entitled to the receipt of the rents and profits of the same hereditaments, if the same were then actually purchased and settled as aforesaid. The deed contained a power for the Duke and Earl *Percy*, from time to time and at any time during their joint lives, to revoke or vary the deed, or any clause or portion thereof, and to declare new uses.

Lord *Algernon Percy* attained twenty-one on the 2nd of October, 1872. On the 30th of July, 1880, a deed was executed (to which Lord *Algernon* was a party), by which the Duke and Earl *Percy* revoked the deed of the 22nd of July, 1871, and made a new and irrevocable appointment of another rent-charge of £10,000 per annum, in lieu of and by way of substitution for the first, charged in the same way as the first, and secured by a similar term of 500 years, limited to the same trustees upon the same trusts. And it was declared that the trustees of the new rent-charge were to hold it upon the trusts, &c., declared in the deed of 1871 of the first rent-charge (having regard to the fact that Lord *Algernon* had attained twenty-one) exactly as if the trusts, &c., contained in the deed of 1871 with reference to the first rent-charge, and the power of substituting Bank Annuities, were repeated with reference to the new rent-charge, except the power of revocation.

In 1880 Lord *Algernon* married, and prior to his marriage he, on the 2nd of August, 1880, executed a deed by which, in consideration of the intended marriage, he exercised his powers of jointuring and charging portions. There were two infant children of the marriage, a son and a daughter. *J. F. Campbell* died on the 17th of February, 1885. The *National Debt (Conversion) Act*, 1888, was passed on the 27th of March, 1888. *Louisa*, Duchess of *Northumberland*, died on the 18th of December, 1890.

All the stock liable to be converted or exchanged in pursuance of the Act of 1888 had before the action was commenced been converted or exchanged, and no 3 per Cent. Bank Annuities could at the time when the action was commenced be purchased.

The action was brought by the Duke and Earl *Percy*; the Defendants were, Lord *Algernon*; his infant son; and the surviving trustee of the rent-charge. The Plaintiffs claimed to be entitled to redeem the rent-charge by transferring to the trustee thereof a sum of £333,333 6*s.* 8*d.* New Consolidated 2¾ per Cent. Annuities, as being the new stock into which the £3 per Cent. Annuities mentioned in the Act had been converted, or any less sum of New Consols, not being less in any one transfer than £3,333 6*s.* 8*d.*, in or towards satisfaction, in the whole or *pro tanto*, of the rent-charge. Lord *Algernon*, on behalf of himself and his wife and children, denied the right of the Plaintiffs so to do, and the trustee refused to receive any sum of New Consols in satisfaction of any part of the rent-charge. The action was brought for the determination of this question by the Court.

Cozens-Hardy, Q.C., and *Onslow*, for the Plaintiffs:—

The Plaintiffs are, by virtue of the provisions of the *National Debt (Conversion) Act*, 1888 (51 & 52 Vict. c. 2) (1), now entitled to redeem the rent-charge by transferring to the Defendants 2¾ per Cent. Stock of the specified amount. Sect. 21, sub-sect. 1, of the Act, perhaps applies, and at any rate sect. 25, sub-sect. 2, exactly applies, to the present case.

(1) By this Act it was provided that the Government 3 per Cent. stocks, known as New Threes, Consols, and Reduced, should be converted into a new stock, bearing interest at 2¾ per cent., reducible thereafter to 2½ per cent., unless the holders thereof should dissent from the conversion, in which case the stock was to be paid off at its par value.

By sect. 21: "(1.) An agreement to transfer any amount of New Three per Cent. Stock, Consolidated Three per Cent. Stock, or Reduced Three per Cent. Stock, or generally any amount of Three per Cent. Stock, may be satisfied by making a transfer of an equal amount of new stock."

By sect. 25: "(2.) In any Act passed or instrument executed before the passing of this Act references to any stock liable to be converted or exchanged in pursuance of this Act may, if the stock is so converted or exchanged, be construed as references to new stock, and in the case of any testamentary instrument executed before the passing of this Act, any disposition, which, but for the passing of this Act, would have operated as a specific bequest of any such stock, shall if the same is so converted or exchanged be construed as a specific bequest of such new stock, and if the same is not so converted, but is paid off or redeemed, shall be construed as a pecuniary legacy of a sum of money equal to the nominal amount of the stock so paid off or redeemed."

NORTH, J.
1892
DUKE OF NORTHUMBERLAND v. PERCY.

If this be not so, the Plaintiffs are entitled to redeem by transferring the specified amount of Local Loans 3 per Cent. Stock, created under sect. 8 of the Act 50 & 51 Vict. c. 16.

Sir *H. Davey*, Q.C., and *Yate Lee*, for the Defendants:—

The Act must be very strictly construed when it is sought to alter by means of it the effect of a contract between parties. Sub-sect. 1 of sect. 21 applies only to a positive agreement to transfer stock; it does not apply to an option to redeem a rent-charge by means of a transfer of stock. In sub-sect. 2 of sect. 25 the words "references to any stock" mean references to any specific stock, not references to 3 per Cent. Stock generally. Sub-sect. 2 provides for the case of a specific bequest of stock, but not for the case of a general bequest. Such a case as the present may just as well have been omitted.

[They were not heard on the second point.]

NORTH, J.:—

It is unnecessary for me to express any opinion upon the second point, because I am in favour of the Plaintiffs upon the first point.

The first point depends simply on the construction of the *National Debt (Conversion) Act*, 1888. I am not satisfied that sect. 21, sub-sect. 1, would not apply to the present case. That sub-section speaks of "an agreement to transfer" any amount of stock, and I am not satisfied that there is any valid distinction between the phrase "an agreement to transfer" and the phrase "an agreement as to the transfer of any amount of new stock." I do not, however, express any concluded opinion upon this point, because sect. 25, sub-sect. 2, seems to me to hit the present case exactly. [His Lordship read sub-sect. 2.]

In the two instruments, the deeds of 1871 and 1880, which operate together, there is a reference to stocks—3 per Cent. Annuities and Bank Annuities—which were liable to be converted or exchanged in pursuance of the Act. That conversion or exchange has since taken place, and, that being so, sect. 25, sub-sect. 2, says that the reference in those instruments to 3 per Cent. Annuities or Bank Annuities is to be construed as a reference

to the new stock created by the Act of 1888. I cannot see any reasonable ground for holding that that is not the effect of the words. It is contended that reference to a "stock liable to be converted or exchanged" means a reference to some particular sum of stock liable to be converted or exchanged. That would be giving a totally different meaning to the Act, and would, as it seems to me, be introducing something which is not to be found in the section, and which would not be intelligible when it was inserted. I cannot understand why a different rule should be adopted when a particular sum is mentioned from that which is to prevail when a particular sum is not mentioned.

Then it is said that the latter part of sub-sect. 2 throws light upon the earlier part, because there is there a provision for the case of "a specific bequest of such stock," and there is no provision for the case of a general bequest of such stock. The reference to a specific bequest seems to me to be made expressly for this reason. It might be said that, if there were a specific bequest of a particular kind of stock which had ceased to exist, the bequest would fail. You could not substitute an equivalent amount of new stock in a gift of old stock which had ceased to exist. I think that is a sufficient reason (if it were necessary to find a reason) for the addition of those subsequent words, and, in my opinion, they do not in any way affect the construction of the earlier words.

Then Mr. *Yate Lee* said that, if the opening words of the sub-section are to have the general meaning suggested, the latter words would be unnecessary, and that then some other sections of the Act would also be unnecessary. I do not see why I should cut down what I think is the clear meaning of the opening words of sub-sect. 2 merely because there are to be found some other sections under which the same result might possibly be accomplished. It is difficult enough to construe Acts of Parliament drawn on the present system; but if, moreover, it is to be said that every clause in an Act is, in addition to its natural meaning, to have such an artificial meaning given to it that it shall not cover anything which may be provided for in any other section of the Act, a new terror would be inflicted on those who have to construe Acts of Parliament.

NORTH, J. 1892 DUKE OF NORTHUMBERLAND v. PERCY.

In my opinion the earlier words of sub-sect. 2 clearly apply to the present case, and the new $2\frac{3}{4}$ per Cent. Stock created by the Act of 1888 may properly be transferred by the Plaintiffs to the trustees in place of the 3 per Cent. Annuities or the Bank Annuities referred to in the two deeds respectively.

Solicitors for all parties: *Bell, Stewards, & May.*

W. L. C.

NORTH, J. 1892 *Nov.* 29.

In re PAGE. JONES *v.* MORGAN.

[1892 P. 1272.]

Trustee—Breach of Trust—Account—Statute of Limitations—Trustee Act, 1888 (51 & 52 *Vict. c.* 59), *s.* 8.

Under the will of a testatrix an infant was entitled to the residue of her estate, which was to be held by the trustees of the will in trust for him, to be paid and transferred to him on his attaining twenty-one. The testatrix died in May, 1875. The infant attained twenty-one in December, 1880. In May, 1892, he took out a summons against the two trustees and executors of the will, claiming an order for the administration of the estate of the testatrix. One of the Defendants did not appear. The other Defendant, who had been the acting trustee and executor, deposed that he had expended the whole of the residue during the Plaintiff's minority in maintaining and educating him. He admitted that he had never rendered any account to the Plaintiff, but said that he had told him during his minority how the fund had been applied. The Plaintiff did not allege that the Defendant had been party or privy to any fraud or fraudulent breach of trust, and there was no evidence that the Defendant had converted any part of the trust fund to his own use, or that he retained any part of it:—

Held, that sect. 8 of the *Trustee Act*, 1888, applied, and that the summons must be dismissed.

But it was dismissed without costs.

ORIGINATING SUMMONS by *C. H. Jones*, the residuary legatee under the will of *Ann Page*, deceased, and, as such, entitled to a share of the residuary estate of *William Page*, deceased (the husband of *Ann Page*), claiming an order for the administration of the real and personal estate of the testatrix and of *William Page*.

The Defendants were, *Thomas Morgan* and *Richard Jones*, who

were the devisees in trust under the will of *Ann Page*, and also her executors.

William Page made his will on the 9th of February, 1861, and thereby appointed his wife and *George Corbett* executors, and he devised and bequeathed to them all his real and personal estate on the trusts therein declared, which were in effect for sale and conversion and investment, and to pay the whole income of the trust fund to *Ann Page* for her life, and after her death the fund was to be in trust for the children of the testator in equal shares, the shares of sons to be vested at twenty-one, and those of daughters at twenty-one or marriage. The testator died on the 16th of February, 1861. His will was proved by both the executors. The widow survived *Corbett*. The testator left two sons and one daughter. They all attained vested interests, and by reason of the death of both the sons, intestate and unmarried, in the lifetime of *Ann Page*, she, as one of the next of kin, became ultimately entitled to one-third of the testator's residue. She made her will on the 18th of April, 1873, and by it she devised and bequeathed all her estate, real and personal, to the Defendants, upon trust for sale and conversion, and out of the proceeds to pay certain legacies, and to invest the residue and hold the same in trust for her nephew, the Plaintiff, if he should be living at her decease, to be paid and transferred to him on his attaining twenty-one. The testatrix died on the 13th of May, 1875. Her will was proved by both executors. Their residuary account furnished to the Inland Revenue Office shewed that the residuary estate of the testatrix amounted to £153. The Plaintiff attained twenty-one on the 6th of December, 1880. This summons was issued on the 26th of May, 1892. The Defendant *Jones* did not appear.

The Plaintiff made an affidavit in which he stated that after the death of *Ann Page* he, at the request of the Defendant *Morgan*, went and resided with him, and continued to do so for more than three years, during which time *Morgan* clothed and maintained him. When the Plaintiff attained twenty-one he attended upon *Morgan* for the purpose of receiving the moneys coming to him, and *Morgan* then informed him that, instead of there being anything due to him, he was in *Morgan's*

NORTH, J. 1892 *In re* PAGE. JONES *v.* MORGAN.

debt. *Morgan* never supplied him with any account. The Plaintiff did not take any steps in the matter, because *Morgan* led him to understand that, after paying expenses, his interest under the will of *Ann Page* only represented a few pounds. *Morgan* never told him that he was interested under the will of *William Page*, and it was only in March, 1892, that the Plaintiff ascertained that he was entitled to one-third of the estate of *William Page*, whereupon he at once instructed his solicitor to obtain, on his behalf, an account from *Morgan* of the disposition of the moneys to which he was entitled. The Plaintiff did not make any allegation of fraud against *Morgan*; but he said that *Morgan* received the whole of the trust moneys and never consulted his co-trustee and executor as to their investment or disposal. In reply to this, the Defendant *Morgan* made an affidavit in which he said: "About twelve months before the Plaintiff came of age I explained to him the position of the trust estate, and of what the same consisted, and how the same had been disposed of, and that there was a small sum due from him to me, and he expressed himself satisfied therewith, and promised to pay me the sum due. He then left me, as I had no further means of his with which to maintain and educate him. He never raised any question about the estates of *Ann Page* or *William Page* for upwards of eleven years. For three years and five months during his minority the Plaintiff resided with me, and was maintained and educated by me. The whole of his share or interest in the estates of *Ann Page* and *William Page* was expended by me in or about his maintenance or education, and in certain law expenses paid on his behalf during his infancy, and I have never since had in my control, custody, or possession any part or parts thereof, and I claim the benefit of the *Statutes of Limitation* and of the *Trustee Act*, 1888. *Richard Jones* was consulted by me and assisted me in the management of the trusts."

The Plaintiff, in reply, made another affidavit, in which he contradicted *Morgan's* evidence as to the explanation which he gave to the Plaintiff before he came of age, and said that no account had ever been rendered to him. He denied that *Morgan* had expended on his maintenance even half of the moneys due to

him, and said that he claimed to be entitled to set off services rendered by him to *Morgan* during the period in which he resided with him against *Morgan's* claim for maintenance. *Morgan* made a second affidavit in which he repeated his former statements.

L. Ryland, for the Plaintiff, asked for an account.

Gatey, for the Defendant *Morgan*:—

Rightly or wrongly, the Defendant has, as his uncontradicted evidence shews, expended the whole amount of the Plaintiff's interest under the two wills in his maintenance and education during his minority. More than six years have elapsed since the Plaintiff attained twenty-one, and the Defendant is entitled to the protection given by sect. 8 (1) of the *Trustee Act*, 1888.

(1) Sect. 8: "(1) In any action or other proceeding against a trustee or any person claiming through him, except where the claim is founded upon any fraud or fraudulent breach of trust to which the trustee was party or privy, or is to recover trust property, or the proceeds thereof still retained by the trustee, or previously received by the trustee and converted to his use, the following provisions shall apply:—

"(*a.*) All rights and privileges conferred by any *Statute of Limitations* shall be enjoyed in the like manner and to the like extent as they would have been enjoyed in such action or other proceeding if the trustee or person claiming through him had not been a trustee or person claiming through him:

"(*b.*) If the action or other proceeding is brought to recover money or other property, and is one to which no existing *Statute of Limitations* applies, the trustee or person claiming through him shall be entitled to the benefit of and be at liberty to plead the lapse of time as a bar to such action or other proceeding in the like manner and to the like extent as if the claim had been against him in an action of debt for money had and received, but so nevertheless that the statute shall run against a married woman entitled in possession for her separate use, whether with or without a restraint upon anticipation, but shall not begin to run against any beneficiary unless and until the interest of such beneficiary shall be an interest in possession."

"(3.) This section shall apply only to actions or other proceedings commenced after the 1st day of January, 1890, and shall not deprive any executor or administrator of any right or defence to which he is entitled under any existing *Statute of Limitations*."

NORTH, J.
1892
In re PAGE.
JONES *v.* MORGAN.

The Defendant no longer retains any part of the trust property or the proceeds thereof, and there is no allegation that he converted any part of it to his own use, or that there has been "any fraud or fraudulent breach of trust to which he was a party or privy": *In re Swain* (1).

Ryland, in reply:—

The Act does not apply. There may be no express allegation of fraud or fraudulent breach; but the true effect of the evidence is that the Defendant fraudulently represented to the Plaintiff, his *cestui que trust*, before he came of age, that nothing was due to him. At any rate, the Defendant admitted that he received the trust property, but he said that he had expended it in the maintenance and education of the Plaintiff during his infancy. The true result of the evidence is that he did not so expend it; but, if he did, the expenditure was purely voluntary, for the Defendant was not the Plaintiff's guardian, and was in no way bound to provide for his maintenance. The Defendant must be treated as having converted the money to his own use.

The Act was not intended to relieve trustees from the necessity of accounting to their *cestuis que trust*; it can only be used as a bar to an application for payment. At present the Plaintiff is only asking for an account.

NORTH, J.:—

In my opinion the Act does apply. The testatrix, *Ann Page*, died in 1875. Under her will the Plaintiff was entitled to the residue of her estate, which was to be paid to him on his attaining twenty-one. He attained twenty-one in December, 1880. The Plaintiff, by this summons issued in May, 1892, asks for an order for the administration of the estate, the Defendant *Morgan* being one of the trustees and executors of the will. The other trustee and executor is also a Defendant; but he has not appeared. There is no evidence, and indeed there is no allegation, of any fraud or fraudulent breach of trust to which *Morgan* was party or privy, and even if there had been, it could not have been dealt with upon an originating summons. The Plaintiff

(1) [1891] 3 Ch. 233.

has adduced no evidence to shew that the Defendant *Morgan* still retains any part of the trust fund, or that he has converted any part of it to his own use. The Defendant *Morgan* swears, and his evidence is practically uncontradicted, that he expended the whole of the residue for the benefit of the Plaintiff during his minority in his maintenance and education. In my opinion the Defendant *Morgan* is entitled to the benefit of the protection given by sect. 8 of the Act of 1888. I must dismiss the summons, but I shall dismiss it without costs. The Defendant *Jones* does not appear, and the Defendant *Morgan* admits that he never furnished any account to the Plaintiff, nor gave him any explanation, except that, while the Plaintiff was an infant, he told him how he had applied the fund.

Solicitors: *Woodcock, Ryland, & Parker*, agents for *Arthur Smith, Birmingham; Ellis, Munday, & Clarke*, agents for *Whatley & Lambert, Great Malvern.*

W. L. C.

In re COLCHESTER TRAMWAYS COMPANY.

[1889 C. 2127.]

Tramway Company—Winding-up—Application of Parliamentary Deposit—Costs of Liquidator—Tramways Act, 1870 (33 & 34 *Vict. c.* 78), *ss.* 12, 64 [*Revised Ed. Statutes, vol. xvi., pp.* 435, 452]—*Board of Trade Rules, August*, 1886, *r.* 22—*Parliamentary Deposits and Bonds Act*, 1892 (55 & 56 *Vict. c.* 27), *s.* 1.

When a tramway company, which has been authorized to construct tramways by a provisional order of the Board of Trade, made under the *Tramways Act*, 1870, and afterwards confirmed by an Act of Parliament, has failed to construct the authorized tramways within the time limited for the purpose, and has been ordered to be wound up, the Court has not, under rule 22 of the Board of Trade Rules, 1886 (the terms of which are in substance the same as those of sect. 1, sub-sect. 2, of the *Parliamentary Deposits and Bonds Act*, 1892), jurisdiction to order the liquidator's general costs of the liquidation to be paid out of the deposit made, in pursuance of sect. 12 of the *Tramways Act*, 1870, prior to the issue of the provisional order.

The liquidator cannot be allowed out of the deposit any costs beyond those of proceedings taken by him in reference to the application of the deposit.

SUMMONS by the official liquidator of the above company (for the winding-up of which an order was made on the 7th of

NORTH, J.
1892
In re COLCHESTER TRAMWAYS COMPANY.

September, 1887) asking for the application of two sums of £816 8*s.* 5*d.* 2½ per cent. Annuities, and £294 2*s.* 4*d.* New Consols, which were standing in Court to the credit of "*ex parte* the undertaking of the *Colchester* Tramways Order, 1884," in the payment of costs and otherwise.

The undertaking of the company was authorized by two provisional orders made by the Board of Trade in 1883 and 1884 under the *Tramways Act*, 1870 (33 & 34 Vict. c. 78), which were afterwards duly confirmed by Acts of Parliament passed in 1883 and 1884. The sums in Court arose from moneys deposited (in pursuance of sect. 12 of the Act of 1870, and the rules made by the Board of Trade under the Act) by the promoters on the obtaining of the provisional orders respectively. The deposit in respect of the provisional order of 1883 was originally a sum of £955 1*s.* 2*d.* 2½ per cent. Annuities, and the deposit in respect of the provisional order of 1884 was the sum of £294 2*s.* 4*d.* New Consols. The tramways authorized were in part constructed; but the company proved a failure, and was ordered to be wound up. On the 3rd of July, 1889, the Chief Clerk made a certificate in the winding-up, by which he allowed debts and claims against the company to the amount of £3022 5*s.* 2*d.* On the 30th of January, 1890, on the application of the liquidator by summons in the matter of the company's undertaking and in the matter of the *Tramways Act*, 1870, that the deposit of £294 2*s.* 4*d.* might be transferred to him as part of the assets of the company, an order was made by Mr. Justice *North*, directing inquiries to be made in chambers whether there were any, and, if so, what road authorities who had incurred expense in taking up any tramway, authorized by the *Tramways Order Confirmation Act*, 1884, placed by the company in or on any road vested in or maintainable by such road authorities respectively, or in making good any damage caused to such roads by the construction or abandonment of such tramways; whether any, and if any, what, compensation had been paid in respect of such expense (if any); what sums would make compensation for such expense (if any); whether there were any and what assets of the company applicable for payment of its debts; and whether there were any and what debts of the company which ought to be paid out of the funds in

Court to the credit of *Ex parte The Colchester Tramways*, 1884. In answer to these inquiries, the Chief Clerk, on the 19th of January, 1891, made a certificate, by which he found that, other than and except the urban sanitary authority of *Colchester*, there were not any road authorities who had incurred expense as mentioned in the inquiry; that no compensation had been paid in respect of the expense incurred by the *Colchester* authority; that the sum of £196 12*s.* 3*d.* would make compensation for that expense; and that the only asset of the company applicable for payment of its debts was a sum of £142 17*s.* 11*d.* standing to the credit of the liquidator in the *Bank of England*. The Chief Clerk also found that debts of the company amounting to £618 4*s.* (which were set forth in a schedule) ought to be paid out of the funds in Court to the credit of *Ex parte The Colchester Tramways*, 1884. On the 11th of June, 1891, an order was made transferring the deposit of £955 1*s.* 2*d.* to the same account as the other deposit. On the 23rd of February, 1892, Mr. Justice *North* made an order varying the certificate of the 19th of January, 1891, by finding that the *Colchester* authority were entitled to be paid £108, part of their claim, in priority to the other creditors of the company, but were only entered to rank *pari passu* with the other creditors as to the remainder of their claim. And it was ordered that the £108 (together with costs), making altogether £130 10*s.*, should be raised out of the funds in Court and paid to the *Colchester* authority. By means of this payment the sum of £955 1*s.* 2*d.* was reduced to £816 8*s.* 5*d.*

The present summons was taken out on the 2nd of June, 1892. It asked that the two sums of stock might be sold and the proceeds of sale applied in paying (1.) the taxed costs of the Solicitor to the Treasury of the summons, of the order of the 23rd of January, 1890, of the inquiries directed by the Court, and of the orders of the 11th of June, 1891, and the 23rd of February, 1892, and the applications on which those orders were made; (2.) the taxed costs, charges, and expenses of the liquidator in winding up the company from the foot of the last taxation thereof (including therein the costs of the summons and of all the said orders, inquiries, and applications, and of carrying out the order to be made on the summons, and the costs of the

NORTH, J.
1892
In re COLCHESTER TRAMWAYS COMPANY.

liquidator up to and including the dissolution of the company); (3.) the remuneration of the liquidator to be fixed by the Chief Clerk; and that the residue might be apportioned rateably among the creditors of the company named in the certificate of the 19th of January, 1891.

Cozens-Hardy, Q.C., and *T. L. Wilkinson*, for the liquidator:—

The question depends on the construction of the Rules made by the Board of Trade under the authority of the *Tramways Act*, 1870, or, possibly, of sect. 1 of the *Parliamentary Deposits and Bonds Act*, 1892. But, in substance, the provisions of sub-sect. 2 of that section are, for the present purpose, identical with those of rule 22 (1) of the Board of Trade Rules of August, 1886. The

(1) Rule 22: "If the promoters, empowered by the order to make the tramway, do not within the time in the order prescribed, or within such prolonged time as aforesaid, and if none is prescribed, or if the time has not been prolonged as aforesaid, then within two years from the passing of the Act confirming the order, complete the tramway, and open it for public traffic, then and in every such case the deposit fund, or so much thereof as shall not have been repaid to the depositors . . . shall, from and after the expiration of the time aforesaid, be applicable, and after due notice in the *London* or *Edinburgh Gazette*, as the case may require, shall be applied towards compensating all road authorities for the expense incurred by them in taking up any tramway or materials connected therewith placed by the promoters in or on any road vested in or maintainable by such road authorities respectively, and in making good all damage caused to such roads by the construction or abandonment of such tramway, and for which injury or loss no compensation or inadequate compensation shall have been paid, and shall be distributed in satisfaction of such compensation in such manner and in such proportions as to the Supreme Court of Judicature in *England*, or Court of Exchequer in *Scotland*, as the case may be, may seem fit; and if no such compensation shall be payable, or if a portion of the said deposit fund . . . shall have been found sufficient to satisfy all just claims in respect of such compensation, then the said deposit fund . . . or such portion of it as may not be required as aforesaid, shall either be forfeited to Her Majesty, and shall accordingly be paid or transferred to or for the account of Her Majesty's Exchequer, in such manner as the Court in which the deposit is made thinks fit to order, on the application of the solicitor of Her Majesty's Treasury, and the deposit fund, when so paid or transferred, or the proceeds thereof, shall be carried to and form part of the Consolidated Fund of the *United Kingdom*; or in the discretion of the Court, if the promoters are a company, and such company is insolvent, and has been ordered to be wound up, or a receiver has been appointed, shall wholly or in part be paid or transferred to such receiver, or to the

effect of the Act is to exclude the right of the Crown by forfeiture, but on the present occasion the Crown makes no claim, except to costs, which the liquidator does not dispute. The liquidator represents the creditors of the company, and, the claims of the Corporation of *Colchester* as the road authority having been provided for, the amount of the deposit ought to be paid to the liquidator "as part of the assets of the company," and ought to be subject to the payment of the liquidator's general costs of the winding up and his remuneration. At any rate, the liquidator's costs of the special certificate and the proceedings relating thereto ought to be paid out of the deposit. The present case differs from previous cases relating to the application of similar deposits. In *In re Bradford Tramways Company* (1) the question was, whether the deposit could be applied in paying creditors of the company until it had been ascertained that they could not be paid by means of calls upon the shareholders, and it was held that it could not be so applied merely for the purpose of relieving the shareholders from their liability. In *In re Lowestoft, Yarmouth, and Southwold Tramways Company* (2) there were no "meritorious" creditors, and, therefore, costs were not allowed to the liquidator, because he represented only persons who were not entitled to anything. In the present case there are "meritorious" creditors, and the liquidator, who represents them and has succeeded in obtaining this money for them, ought to have his costs and remuneration out of the fund. The rule speaks of the deposit being "applied as part of the assets of the company for the benefit of the creditors thereof," and in a winding-up the assets of the company are applied first in paying the costs of the liquidation. The creditors would not have received a shilling if a winding-up order had not been made and a liquidator appointed, and it is reasonable that the costs of the liquidation and the remuneration of the liquidator should be first paid.

---

liquidator or liquidators of the company, or be otherwise applied as part of the assets of the company for the benefit of the creditors thereof."

[The latter part of this rule (from the words "or in the discretion of the Court" to the end) are in substance the same as those of sub-sect. 2 of sect. 1 of the *Parliamentary Deposits and Bonds Act*, 1892 (55 & 56 Vict. c. 27).]

(1) 4 Ch. D. 18.

(2) 6 Ch. D. 484.

NORTH, J.
1892
In re COLCHESTER TRAMWAYS COMPANY.

S. Hall, Q.C., and *Eustace Smith*, for the *Colchester* road authority and other creditors:—

We do not object to the payment out of the deposit of the costs properly incurred by the liquidator in obtaining payment of that fund out of Court. But the general costs of the liquidation and the remuneration of the liquidator ought not to be paid out of the deposit. The rule does not authorize such a payment. The point was really decided by *In re Lowestoft, Yarmouth, and Southwold Tramways Company* (1). The right of the liquidator cannot depend upon whether there are or are not "meritorious" creditors. The deposit can only be applied for the benefit of the creditors of the company. The liquidator is not a creditor.

Ingle Joyce, for the Crown.

T. L. Wilkinson, in reply:—

In *In re Lowestoft, Yarmouth, and Southwold Tramways Company*, Sir *G. Jessel*, M.R., only decided that, as the deposit was forfeited to the Crown, he would not order the liquidator's costs to be paid out of it. The rule does not say that the deposit is to be paid to the creditors, but that it is to be applied for their benefit. The costs of liquidation have been incurred for their benefit, and ought, therefore, to be paid out of the deposit, and the liquidator ought to be remunerated for his trouble.

NORTH, J.:—

In my opinion the contention of the Respondents is right. The undertaking of the company has been abandoned; an order has been made to wind it up, and a liquidator has been appointed. Various proceedings have been taken in the winding-up for settling the list of contributories and for other purposes. The assets of the company are very small in amount, and the claims made by creditors very much exceed the assets. The creditors would have to go without payment, but for the fact that there are these parliamentary deposits, which are available for the purposes mentioned in rule 22 of the Board of Trade Rules and the Act of 1892. At the instance of the liquidator,

(1) 6 Ch. D. 484.

inquiries were directed to ascertain what claims ought to be paid out of the deposits—whether there were any of what have been called "meritorious" creditors. The Chief Clerk has found that some (but not all) of those persons who have been ascertained to be creditors of the company are "meritorious" creditors. The deposits are sufficient in amount to pay these creditors in full, but they are not sufficient to pay also the liquidator's general costs incurred in the winding-up and his remuneration. But some additional costs have been incurred by him with reference to the application of the deposits—costs in the matter of the *Tramways Acts*—and I think the liquidator is entitled to have those costs paid out of the deposits. It is not really necessary for me to decide this, for it is conceded by the Respondents that the liquidator shall have those costs. The order must provide for payment to him accordingly. But the liquidator is not content with this; he claims a larger amount of costs. In the first place, it is said that the special certificate proceeded to a great extent upon the evidence on which the general certificate in the winding-up was founded, and that he ought to have the costs of those affidavits filed in the winding-up which were used for the purpose of the special certificate. The Taxing Master will know how to deal with this matter, and I need not give him any special directions. Then the liquidator asks that his general costs of the winding-up may be paid out of the deposits. If these deposits formed part of the general assets of the company he would of course be entitled to have his costs out of the fund. But the deposits are not part of the company's general assets. By the law as it formerly stood, the deposits would under existing circumstances have become forfeited to the Crown. But the recent legislation has provided for a different application of the fund. [His Lordship read rule 22, and continued:—]

The final words of this rule, "shall be otherwise applied as part of the assets of the company for the benefit of the creditors thereof," are very important words, and I cannot overlook them. No one is, in my opinion, entitled to share in the fund unless he is a creditor of the company. I think that the costs of the proceedings taken to obtain the fund for the creditors ought to be paid first out of it; but I cannot see how, in any sense of the

NORTH, J.
1892
In re COLCHESTER TRAMWAYS COMPANY.

words, the liquidator can be called a "creditor of the company" in respect of his costs in the winding-up. His claim to those costs has arisen since the winding-up order was made. He is entitled, no doubt, to have his general costs of the liquidation paid first out of the general assets of the company. But these deposits are not general assets of the company; they are only made assets for a particular purpose, and, in my opinion, I have no jurisdiction to order the general costs of the liquidation to be paid out of them. I can find nothing in the judgment in the *Lowestoft Case* (1) to shew that the Master of the Rolls would have given the liquidator his costs if there had been meritorious creditors. But the point with which I have now to deal was not decided then. The costs of the creditors must be paid out of the fund, and also those costs of the liquidator which I have mentioned. The residue will be divided among the creditors named in the special certificate in proportion to the amounts of their debts.

Ingle Joyce:—The Crown raises no objection to that.

Solicitors: *Atkinson & Dresser; Richard Tree; Hare & Co.*

W. L. C.

NORTH, J.
1892
Dec. 6, 7, 8, 10.

CHRISTIE *v.* DAVEY.

[1892 C. 3775.]

Injunction—Noise—Playing on Musical Instruments—Reasonable Use of House—Malice.

The giving of musical lessons by a teacher of music, the lessons extending over seventeen hours in a week, in a house separated from the adjoining house by a party-wall, there being also from time to time practising on the piano and violin, and singing, and in the evening musical performances for the entertainment of the persons living in the house, and occasionally musical parties, and frequent practising on the violoncello as late as eleven at night:—

Held, not to constitute a legal nuisance of which the occupier of the adjoining house was entitled to complain.

But an injunction was granted to restrain the occupier of the adjoining house from causing or permitting any sounds or noises in his house, so as

(1) 6 Ch. D. 484.

to vex or annoy the occupier of the first house, the Court being satisfied that he had been making noises on musical instruments and otherwise maliciously for the purpose of annoying the occupier of the first house.

TRIAL OF ACTION.

The object of the action was to obtain an injunction to restrain the making of noises in the Defendant's house.

The Plaintiffs were Mr. *J. F. Holder Christie* and his wife, who resided at No. 68, *Angell Road, Brixton*; the Defendant was Mr. *H. Fitzer Davey*, who resided in the house which immediately adjoined the Plaintiffs' house, the two houses being "semi-detached." Mrs. *Christie* was a teacher of music and singing. She taught music at a high school, and also took private pupils, some of whom came to her house for their lessons. Her daughter, who was a medallist of the *Royal Academy of Music*, lived in the house, and she gave lessons on the piano and the violin, some of these being to pupils who came to the house. A Miss *Kennedy*, who was also a medallist of the *Royal Academy*, came to reside in the Plaintiffs' house on the 27th of September, 1892. The Plaintiffs had a son, who also lived in the house. He was during the day engaged in business, and did not return home till late in the evening. He was in the habit of playing the violoncello up to eleven o'clock at night; but he was only an amateur. The Defendant was an engraver on wood. The Plaintiffs had occupied their house for three years, and up to the 30th of September, 1892, the relations between them and the Defendant had been harmonious. No complaint had been made on either side. On the 30th of September the Defendant wrote to Mr. *Christie* as follows:—

"During this week we have been much disturbed by what I at first thought were the howlings of your dog, and, knowing from experience that this sort of thing could not be helped, I put up with the annoyance. But, the noise recurring at a comparatively early hour this morning, I find I have been quite mistaken, and that it is the frantic effort of some one trying to sing with piano accompaniment, and during the day we are treated by way of variety to dreadful scrapings on a violin, with accompaniments. If the accompaniments are intended to drown the vocal shrieks or teased catgut vibrations, I can assure you it

NORTH, J. 1892 CHRISTIE v. DAVEY.

is a failure, for they do not. I am at last compelled to complain, for I cannot carry on my profession with this constant thump, thump, scrape, scrape, and shriek, shriek, constantly in my ears. It may be a pleasure or source of profit to you, but to me and mine it is a confounded nuisance and pecuniary loss, and, if allowed to continue, it must most seriously affect our health and comfort. We cannot use the back part of our house without feeling great inconvenience through this constant playing, sometimes up to midnight and even beyond. Allow me to remind you of one fact, which must most surely have escaped you—that these houses are only semi-detached, so that you yourself may see how annoying it must be to your unfortunate next-door neighbour. If it is not discontinued I shall be compelled to take very serious notice of it. It may be fine sport to you, but it is almost death to yours truly."

In consequence of the tone of this letter Mr. *Christie* returned no answer to it. The Plaintiffs alleged that on the very same, or the next, day the Defendant commenced a series of noises in his house whenever the playing of music was going on in the Plaintiffs' house—such as knocking on the party-wall, beating on trays, whistling, shrieking, and imitating what was being played in the Plaintiffs' house. This conduct, it was said, continued up to the 12th of October.

The Plaintiffs consulted their solicitors, and they, on the 12th of October, wrote to the Defendant as follows:—"We have been consulted by Mr. and Mrs. *Christie* in reference to the outrageous system of annoyance which you have adopted towards them in hammering and beating trays against the party wall between your house and theirs, and making other offensive noises whenever any music is going on in their house. Your letter to Mr. *Christie* on the subject was brought to us at the time; but the tone thereof was so extremely coarse and insulting that we advised our client to treat it with the contempt which it appeared to us to deserve. It may be that, if you are not of a musical nature, the sound which may reach you from our clients' house owing to the thinness of the party wall (for which, by the way, they are not responsible), is not very agreeable to you; but at the same time you must remember that our clients have to carry

on their profession, as well as yourself, and, moreover, we have yet to learn that it is an unreasonable use of a private house to play the pianoforte or sing. Your own complaint that the music interferes with the exercise of your profession is, we understand, quite unfounded, as we believe the fact is that you have converted the upper storey of your house into an office, where you could not possibly hear what is going on on the ground floor next door. On the other hand, your disgraceful proceedings are the cause of very much discomfort and annoyance to our clients, and seriously interfere with their professional pursuits and engagements, and, therefore, unless you at once give us an undertaking to discontinue them, you will compel our clients (much as they would wish to avoid quarrelling with their neighbours) to adopt the only remedy which appears to be open to them—namely, to take proceedings against you in the Chancery Division to obtain an injunction to restrain the continuance of the conduct you have seen fit to adopt."

The Defendant, in reply to this letter, wrote on the next day as follows:—"Your favour of the 12th to hand *in re Christie*, in which you talk of 'outrageous system of annoyance, &c., hammering and beating trays, &c.' This I emphatically deny. I have a perfect right to amuse myself on any musical instrument I may choose, and I am quite sure I should be the last person to do anything knowingly to annoy my neighbours. What I do is simply for recreation's sake, and to perfect myself in my musical studies. You express your opinion about my letter, which is quite contrary to my own. I see nothing coarse or insulting in it; but I look upon it as shewing my desire to be on friendly terms with my neighbours, for I wrote in quite a jocular manner. However, each one to his taste. Your third paragraph questions my musical taste. Well, I believe, from my past musical training, that I am perfectly qualified to distinguish the difference between music and noise. Now, seriously, I put it to you, is it not most excruciating to have constant repetitions of the five-fingered exercises, and only receiving the higher notes of the vocal efforts? I do not for one moment think that there are no beautiful gradations; but they don't reach me. I am quite thankful, I can assure you, for your

NORTH, J. 1892 CHRISTIE v. DAVEY.

eminently legal opinion as to your clients' non-responsibility for the thinness of the party wall. I do remember that your clients have to carry on their profession as well as myself, and this has made me shew more forbearance than I otherwise should have done. But, while making all allowances for the privilege of those who rent private houses, I have yet to learn that the same principle does not apply to me as well as to them. I now come to the most serious part of your letter, in which you say that my complaint of the music interfering is quite unfounded. You have the two opinions, mine and your clients'; one of us is evidently (to say the least of it) departing from the truth, and it is not I. The sounds reach up to my room most clearly, and my assistants are constantly complaining to me about it. We have the most difficult portraits to reproduce, requiring great thought and the most delicate treatment. This is my *spécialité*, and, if the thing were (I mean the noise) only now and then, I should not have thought of complaining; but it is almost intermittent (*sic*), morning, noon, and night, and perhaps the thinness of the party wall acts as a conductor and carries this terrible noise right up to my studio. I am given to understand that your clients have no carpet on the floor, nor pictures on the walls, consequently there is nothing to deaden the sounds, as in other private houses. Your clients' predecessor was a very musical person indeed; but, his place being properly furnished, the sound did not reach here to any extent; but here everything is done to increase the sound, and I have yet to learn that I am compelled to be a martyr because my neighbour is musical. Lastly, you say that I interfere with your clients' professional pursuits. Just so; this is simply reversing my complaint, and what is sauce for the goose is sauce for the gander. I have not complained without reason, for I cannot sit downstairs either to read a book or converse with friends or clients, as the case may be, but what this atrocious hubbub drowns all efforts to hear, and is continued on to midnight and after, and often commences a little after 8 A.M. When illness was in my house no cessation took place, and to my mind your clients have lately carried it so far as to shew that it is done maliciously; so you will, I have no doubt, see that, as I am the party wronged, and have the right

of complaint on my side, I shall positively refuse to give any undertaking that I shall cease my musical performances. To shew my willingness to meet the convenience of my neighbours, I am perfectly willing to compromise the matter by their agreeing to have one part of the week and me the other. I will give them the choice, leaving the Lord's Day as it really ought to be, a day of rest, neither of us using it as a day of musical recreation, but absolute rest. Here is a case in point now—while I am writing this up in my studio there is some one next door making frantic efforts to reach an upper note. It is intolerable; the house is no longer a private house, but a public one, pupil after pupil coming and practising, and letting out their pianos for practising only, sometimes two pianos going at the same time. It is my intention during these winter months to endeavour to perfect myself on the following instruments—viz., flute, concertina, cornopean, horn, and piano, which my child is learning to accompany me. I used to play them at one time, both in a church band and an amateur troupe; but I have been out of practice lately, but hope soon to regain my former proficiency."

The writ in the action was issued on the 20th of October, 1892, and by it the Plaintiffs claimed an injunction to restrain the Defendant, his servants and agents, from (1.) playing concertinas, horns, flutes, pianos, and other musical instruments; (2.) blowing whistles; (3.) knocking on trays or boards; (4.) hammering; (5.) shrieking or shouting; (6.) making other loud noises in such manner as to cause annoyance or injury to the Plaintiffs, or either of them, as occupiers of their house, and from otherwise using the Defendant's adjoining house in such manner as to cause annoyance or injury to the Plaintiffs, or either of them; and damages for the Defendant's wrongful acts. The Plaintiffs gave notice of motion for an interlocutory injunction, and the Defendant delivered a notice which he called a "notice by way of counter-claim," by which he asked for an injunction to restrain the Plaintiffs from making noises in their house by giving lessons, practising or playing upon pianos, violins, violoncellos, or other musical instruments, or singing in an unreasonable manner or at unreasonable times, or from

NORTH, J. 1892 CHRISTIE v. DAVEY.

otherwise causing or permitting loud noises to be made in the house in such a manner as to cause nuisance, annoyance, or injury to the Defendant as occupier of the adjoining house; and damages for wrongful acts of the Plaintiffs in making or permitting such noises.

The trial of the action was advanced, and it was agreed that the Defendant's notice should be treated as a counter-claim properly delivered.

The evidence, as the Court held, shewed that the lessons given by Mrs. *Christie* and her daughter to pupils who came to the house occupied altogether seventeen hours in the week. On two days in the week, Wednesday and Saturday, no lessons were given. The Plaintiffs' daughter and Miss *Kennedy* practised at times. The Plaintiffs sometimes had musical parties in the evening, and at other times Mrs. *Christie* and the other ladies played the piano in the evening for the amusement of the family. The Plaintiff's son was in the habit of practising the violoncello in the kitchen after ten o'clock at night till eleven o'clock, and sometimes a little later, and on one occasion when he was unwell he had practised in his bedroom upstairs. He occasionally practised for a short time on Sunday afternoon and evening.

The Plaintiffs adduced evidence in support of their allegations as to the noises which they heard in the Defendant's house in the period from the 1st of October to the issue of the writ.

The witnesses said that the Defendant had what they described as "mock concerts" for the purpose of annoying the Plaintiffs.

The Defendant and his witnesses denied that there had ever been any knocking on tea-trays, or hammering on the wall in his house, or that he had ever had any "mock concerts." They said that there had been no noise except that produced by playing of the concertina and other musical instruments, and such hammering as was incident to the Defendant's business of an engraver. The Defendant had been for some years in the habit of having a musical evening once a week, on which occasions friends came to spend the evening at his house.

Cozens-Hardy, Q.C., and *Upjohn*, for the Plaintiffs:—

The Defendant's own letter shews, and the evidence confirms this, that he deliberately and maliciously made noises for the mere purpose of annoying and vexing the Plaintiffs, and interfering with their reasonable enjoyment of their house. In such a case the Court will interfere by injunction to protect the Plaintiffs. Indeed, even in cases in which there has been no malice, the Court has restrained the making of noises which have caused serious annoyance and injury to a plaintiff: *Gaunt* v. *Fynney* (1); *Ball* v. *Ray* (2); *Broder* v. *Saillard* (3); *Reinhardt* v. *Mentasti* (4). The Defendant has, to use the words of Lord *Selborne* in *Gaunt* v. *Fynney* (5), been acting in a manner "which, beyond fair controversy, ought to be regarded as excessive and unreasonable." "A nuisance by noise (supposing malice to be out of the question) is emphatically a question of degree."

As regards the Defendant's counter-claim, the evidence shews that the Plaintiffs have not been making any unreasonable use of their house. The Defendant has entirely failed to make good his allegations.

C. Lyttelton Chubb, for the Defendant:—

No reported case at all like the present is to be found in which an injunction has been granted. The Plaintiffs in fact seek to restrain the Defendant from making a noise, in order that they may be the better able to make a noise themselves. They admit that music is almost continually going on in their house. Plaintiffs who thus act themselves are not entitled to prevent their neighbour from playing on any instrument he likes. The evidence shews that the Plaintiffs' case is *de minimis*. The Defendant had been suffering annoyance for some years, and it was greatly increased after Miss *Kennedy* came to live with the Plaintiffs. The Plaintiffs have exaggerated every sound which in any way interfered with their music; they were, as Lord *Selborne* said in *Gaunt* v. *Fynney* (6), "prepossessed

(1) Law Rep. 8 Ch. 8, 12.
(2) Ibid. 467.
(3) 2 Ch. D. 692, 700.
(4) 42 Ch. D. 685.
(5) Law Rep. 8 Ch. 12.
(6) Ibid. 13.

NORTH, J. 1892 CHRISTIE v. DAVEY.

listeners." The Plaintiffs are not entitled to absolute silence in their neighbour's house.

[NORTH, J.:—Is there a legal nuisance? *Harrison* v. *Good* (1).]

In *Tod-Heatly* v. *Benham* (2), it was questioned whether *Harrison* v. *Good* was right in limiting the term "nuisance" in a covenant to that which is a legal nuisance. But those cases depended on covenant.

[*Cozens-Hardy*, referred to *German* v. *Chapman* (3).]

Even if a man is carrying on a legitimate trade, this will not justify his causing a nuisance to his neighbour: *Broder* v. *Saillard* (4).

[NORTH, J., referred to *Kemp* v. *Sober* (5).]

The Plaintiffs are making an unreasonable and excessive use of their house. There has been no acquiescence on the part of the Defendant. There has been nothing more than forbearance by him.

NORTH, J.:—

In my opinion the Plaintiffs are entitled to the injunction for which they ask. They have lived for three years in a semi-detached house, and, from the description given to me of the way in which sounds are heard between the houses, I think the party-wall cannot be very substantial. The Plaintiffs' family consists of the husband, who, perhaps fortunately for himself, is very deaf; the wife, who is admitted to be a skilful musician and an excellent pianist; and a daughter, a young lady who has received a good musical education and has taken a very good musical degree. She teaches the pianoforte and violin, but she does not sing. The mother and the daughter have musical pupils, some at home and some abroad. I have no reason to conclude that there has been of late any increase in the number of the pupils or in the extent of the lessons. [His Lordship referred to the evidence on this point, and continued:—] Miss *Christie* practises to some extent; Mrs. *Christie* does not; and the

(1) Law Rep. 11 Eq. 338.
(2) 40 Ch. D. 80.
(3) 7 Ch. D. 271.
(4) 2 Ch. D. 692.
(5) 1 Sim. (N.S.) 517.

Plaintiffs occasionally have musical parties in the evening, and they also have music in the evening for their own enjoyment. On the 27th of September Miss *Kennedy* came to stay in the Plaintiffs' house, and it has been suggested that this led to the Defendant's writing the letter of the 30th of September. I do not know whether it did; but I find it difficult to reconcile that suggestion with the terms of the letter. Miss *Kennedy* has a contralto voice, and in that letter the Defendant complains that he hears only the higher notes of what is sung in the Plaintiffs' house, and that the lower notes do not reach to him. However that may be, Miss *Kennedy* came to the Plaintiffs' house on the 27th of September. She is a very skilful musician and is a medallist of the *Academy of Music*, and she has come to *London* for the purpose of continuing her musical studies. From the evidence I think that she has not practised much at home, though no doubt she performs a certain amount of music during the week in the house. The Defendant lives in the adjoining house. He has a wife and a small child. He and his family are said to be musical, and for some years past they have been in the habit of having a musical evening once a week. I cannot find in the evidence any suggestion that those musical evenings have been conducted in a manner open to any objection. The music does not seem to have been of a very high class, but there is nothing to lead me to suppose that it was not good music of its class. On the 30th of September, moved by some cause or other, the Defendant wrote a letter to Mr. *Christie*. [His Lordship read the letter, and observed that though the parties had lived next door to each other for three years, no complaint had ever been made previously, either by the Plaintiff to the Defendant or by the Defendant to the Plaintiff.]

This letter was certainly written in a tone calculated to set up the backs of the Plaintiffs' family. The letter was received by Mr. *Christie* on the 1st of October. The next letter was written by the Plaintiffs' solicitor to the Defendant on the 12th of October. During the interval, according to the Plaintiffs' evidence, unusual noises had proceeded from the Defendant's house which interfered with the comfort of the Plaintiffs' family, and to some extent with the pupils' lessons, and also with Miss *Kennedy's*

NORTH, J.
1892
CHRISTIE v. DAVEY.

composition and practice. This went on to such an extent that Mr. *Christie* instructed his solicitors to write the letter of the 12th of October. I agree entirely with the suggestion of Mr. *Chubb*, that very possibly the Plaintiff and his witnesses might feel disposed, after the Defendant's letter of the 30th of September, to regard what was done in his house with more critical ears than if no such a letter had been written. [His Lordship read the letter of the 12th of October, and the Defendant's reply.]

In that reply the Defendant took his stand upon a different ground from that which he has now adopted. If the Defendant had been doing nothing but what he had done before, or if there had been an increase of noise in the carrying on of his business, I should have expected him to say so. But I find neither the one nor the other asserted in his letters. There is no denial of the Plaintiffs' allegations; but the Defendant asserted that he had a perfect right to make the noises complained of, and that what he was doing was done for his own recreation. [His Lordship commented upon the evidence as to what had taken place in the Defendant's house, and said that he came to the conclusion from the Plaintiffs' evidence, which in substance he trusted, that in the interval between the 1st of October and the issue of the writ in the action the noises made in the Defendant's house were of a very different character from those which had been previously made. On this point he accepted the evidence of the Plaintiffs' witnesses, and did not accept that of the Defendant so far as it was opposed to that of the Plaintiffs'. He came to the conclusion that the noises complained of did not arise, as had been suggested, in part from anything which had been done in the due course of the Defendant's trade. His Lordship continued:—]

The result is that I think I am bound to interfere for the protection of the Plaintiffs. In my opinion the noises which were made in the Defendant's house were not of a legitimate kind. They were what, to use the language of Lord *Selborne* in *Gaunt* v. *Fynney* (1), "ought to be regarded as excessive and unreasonable." I am satisfied that they were made deliberately and maliciously for the purpose of annoying the Plaintiffs. If

(1) Law Rep. 8 Ch. 12.

what has taken place had occurred between two sets of persons both perfectly innocent, I should have taken an entirely different view of the case. But I am persuaded that what was done by the Defendant was done only for the purpose of annoyance, and in my opinion it was not a legitimate use of the Defendant's house to use it for the purpose of vexing and annoying his neighbours. I am not satisfied with the Defendant's attempts to explain away the Plaintiffs' statements. This being so, I am bound to give the Plaintiffs the relief which they ask.

I now come to the Defendant's counter-claim. He complains of that which, if his statements were true, would be a terrible nuisance in fact, and I am not prepared to say that it would not also be a legal nuisance calling for the interference of the Court. The Defendant says that the noise of musical instruments in the Plaintiffs' house goes on from morning till night—thirteen hours a day—Sunday included. In my opinion, there is no evidence of any such a nuisance as that. There is clear evidence of what has been done in the Plaintiffs' house. Mrs. and Miss *Christie* have pupils at home for periods amounting in the whole to seventeen hours in a week. To some extent their hours overlap. On Mondays the lessons occupy four and a half hours; on Tuesdays two and a half hours; on Wednesdays there are none; on Thursdays they occupy three hours; on Fridays six hours; and there are none on Saturdays. In my opinion, the giving of lessons for seventeen hours a week in the house of musicians, who gain their living by the exercise of their profession, does not give the Defendant any legal ground of complaint. Nor do I think that the additional circumstance that Miss *Kennedy* plays and sings sometimes, and Miss *Christie* practises sometimes, and that the Plaintiffs occasionally have musical performances in the evening, will create a legal nuisance. I cannot see what legal objection there is to that. I am for the moment not considering the son's playing on the violoncello. The profession which the Plaintiffs' family practise is a perfectly legitimate and proper one, and I cannot omit to notice the fact that for three years not a single complaint was made by the Defendant to the Plaintiffs. I asked counsel whether they were aware of any case in which it has been held that the carrying on of a ladies' school

NORTH, J. 1892 CHRISTIE v. DAVEY.

is a nuisance which the Court will restrain. There are, no doubt, cases in which the Court has restrained the carrying on of a ladies' school in breach of a covenant; but, so far as I know, there is no case in which it has been held that, apart from contract, the carrying on of a ladies' school is a nuisance which can be restrained by injunction. The existence of a ladies' school would, I think, in all probability cause more annoyance to the occupier of the adjoining house than has been caused by the Plaintiffs to the Defendant. Neither on authority nor on principle can I see any ground for saying that what has been done in the Plaintiffs' house has gone beyond a legitimate use of the house. If there were the slightest ground for believing that what has been done by the Plaintiffs' household had been done maliciously, for an improper purpose, I might have regarded the case with a very different view. But, in my opinion, there is no foundation for such a suggestion, and I can see no ground for granting an injunction against the Plaintiffs. So far I have left out of consideration the playing of the violoncello by the Plaintiffs' son. He has for some years learnt the violoncello and has had lessons away from home. It seems to be his habit to go down into the kitchen and there practise the violoncello from ten o'clock to eleven at night. I am willing to believe that he may often have played as late as a quarter-past eleven. On one occasion only, when he was unwell, was there any playing in his bedroom, and that was in the daytime. I do not think that there was anything unreasonable in what he has done. But I will say this for his guidance in future, that it would be only reasonable that he should cease playing at eleven o'clock, or as soon as possible afterwards. I do not mean that he is not to finish a piece which he is actually playing and to stop precisely at eleven; but I think he should not begin any fresh piece after eleven. I do not believe that his playing has been open to any objection, nor do I believe that the Defendant really thinks so.

I will grant an injunction to restrain the Defendant from making noises in his house so as to vex or annoy the Plaintiffs. But this order is not to prevent the Defendant from using his house for the legitimate purposes of his business, nor from

continuing his musical evenings as they were conducted before the 1st of October.

Minute of order as drawn up by the Registrar:—

That the Defendant, his servants and agents, be perpetually restrained from causing or permitting any sounds or noises in his house so as to vex or annoy the Plaintiffs, or either of them, or the occupiers of their house. But this order is not to prevent the Defendant from using his house for the legitimate purposes of his trade or profession of an engraver, nor from continuing his musical evenings as carried on before the 1st of October, 1892.

Solicitors: *Sole, Turner, & Knight; Brown & Woolnough.*

W. L. C.

In re ADAMS.
ADAMS *v.* ADAMS.

[1892 A. 363.]

Infant—Maintenance—Contingent Interest—Income—Conveyancing and Law of Property Act, 1881 (44 & 45 *Vict. c.* 41), *s.* 43.

Maintenance can be allowed for children out of the income of a share of residue bequeathed in trust for such of them as shall attain twenty-one, or, being daughters, marry, until such time as the interest of one of them becomes vested.

Semble, the whole income would belong to children who had attained a vested interest.

In re Jeffery (1) and *In re Burton's Will* (2) considered.

THIS was an originating summons to determine whether the trustees of the will of *John Gregory Adams* were authorized under sect. 43 of the *Conveyancing Act*, 1881, to apply the income of one-third of the residuary estate bequeathed in trust for the children of the testator's brother, *Thomas Adams*, in equal shares, in case they attained twenty-one, for the maintenance and education of such children.

The testator's brother, *Thomas Adams*, died in 1882. The testator's will was dated March, 1887. He devised and bequeathed his estate not otherwise disposed of to his executors and trustees upon trust for sale and conversion into money, and

(1) [1891] 1 Ch. 671. (2) [1892] 2 Ch. 38.

NORTH, J.
1892
In re ADAMS.
ADAMS *v.* ADAMS.

after payment of legacies, funeral and testamentary expenses, and debts, "to stand possessed of the residue of the said money in trust as to one-third part thereof in equal shares in trust for all the children of my said brother *Thomas Adams* who shall survive me, and, being sons or a son, shall attain the age of twenty-one years, or, being daughters or a daughter, shall attain that age or marry, and the issue of any child of my said brother who shall predecease me, such issue, if more than one, to take in equal shares only the share which their deceased parent would have taken if living." The testator died in November, 1890, and his will was proved in March, 1891, by two of his executors, the third having renounced.

The testator's brother *Thomas* had six children, all of whom survived the testator, and none of them were married. The eldest child, *John Gregory Adams*, was born January, 1874. The Plaintiffs to the summons were the infant children of *Thomas Adams*; the Defendants were the trustees of the will and the testator's next of kin other than the Plaintiffs and the trustees.

W. F. Webster, for the Plaintiffs:—

The income of property to which infants are contingently entitled may be applied for their maintenance, under sect. 43 of the *Conveyancing Act*, 1881, if the income does not belong to others. In *In re Cotton* (1), under *Lord Cranworth's Act*, it was held that maintenance could be given for an infant entitled contingently under a gift similar to the present gift. The view of Mr. Justice *Chitty* in *In re Burton's Will* (2) is, I submit, the correct one, and if one of these children were of age that child would not be entitled to the whole income to the exclusion of the others. In the case of *In re Jeffery* (3), *In re Cotton* was not cited. Of the cases relied on there, *Furneaux* v. *Rucker* (4) was really a settlement by bequest of a leasehold house; the tenant for life was dead; there was no vested interest: the income, therefore, fell into the residue. *Shepherd* v. *Ingram* (5) only goes to the extent that an infant is not to share in income accrued

(1) 1 Ch. D. 232.
(2) [1892] 2 Ch. 38.
(3) [1891] 1 Ch. 671.
(4) W. N. (1879) 135.
(5) Amb. 448.

before his birth. In *Mills* v. *Norris* (1), *Scott* v. *Earl of Scarborough* (2), *Rochford* v. *Hackman* (3), and *Brandon* v. *Aston* (4) there were special circumstances, and they are consistent rather with the view of Mr. Justice *Chitty* in *In re Burton's Will* (5). A gift of residue carries the income of residue: *Green* v. *Ekins* (6); *Kidman* v. *Kidman* (7); therefore, at least, pending the vesting of any interest, the income contingently belongs to the infants, and maintenance can be allowed under sect. 43 of the *Conveyancing Act*, 1881.

Southall, for the next of kin:—

The view of the Court in *In re Jeffery* (8) is correct, and the infants are not entitled to income accruing during their infancy. The 43rd section of the *Conveyancing Act* does not give infants any income they would not otherwise be entitled to: *In re Dickson* (9). The intermediate income is undisposed of.

Disturnal, for the trustees.

1892. Dec. 20. NORTH, J. (after stating the trusts in favour of the children of the testator's brother *Thomas*, continued):—

The question is, what is the effect of that gift? Who take the income of the share given in trust for the children of the testator's brother *Thomas*? Can the income be applied for the maintenance of the six infants?

During the course of the argument it was urged upon me that the case I decided of *In re Jeffery* was not rightly decided, and that the expression of opinion by Mr. Justice *Chitty* in *In re Burton's Will* was right. I am sorry that the question has not gone to the Court of Appeal. I have very fully considered the case of *In re Jeffery*, and I do not see any reason for withdrawing from the view I took in that case. If I had had the decision of another Judge before me before I decided that, I might have followed his view. As it is, I have to form my

(1) 5 Ves. 335.
(2) 1 Beav. 154.
(3) 9 Hare, 475.
(4) 2 Y. & C. Ch. 30.
(5) [1892] 2 Ch. 38.
(6) 2 Atk. 473.
(7) 40 L. J. (Ch.) 359.
(8) [1891] 1 Ch. 671.
(9) 29 Ch. D. 331.

NORTH, J.

1892

In re ADAMS.

ADAMS *v.* ADAMS.

own opinion. That case, however, is not the same as this; and I do not intend to follow that question further, except that I think it right to refer to two cases.

The first of the two cases I wish to refer to is that of *Furneaux* v. *Rucker* (1), mentioned by me in *In re Jeffery* (2). On then looking at the *Weekly Notes*, I was somewhat misled, for I understood that the subject-matter was a share of a general residue. It is quite true that the word "residue" is not mentioned. I have lately looked at the notes of that case in the Registrar's books. These notes are very instructive. In that case the property, the subject of the report in the *Weekly Notes*, was a specific leasehold house—not residue at all. The testator had disposed of his residue otherwise. The rents of the leasehold house were given to *Emma Furneaux* for life, and after her death the house was bequeathed in equal shares to such of her children as, being sons, attained twenty-one, and being daughters attained twenty-one, or married. The matter came before the Master of the Rolls on the 13th of May, 1878, on further consideration. At that time the tenant for life was dead. There were three children, all infants; one was a daughter unmarried. The Court made an order declaring the contingent rights of the children, and that the rents accrued since the death of the tenant for life, and which would accrue while the interests of all the children were contingent, were subject to the trusts of the will concerning the residuary personal estate of the testator. On the 23rd of April, 1879, one of the infants attained twenty-one. The action was brought on before the Master of the Rolls on motion. He declared that, notwithstanding the former order the son who had attained twenty-one was entitled to the whole of the rents from the 23rd of April, 1879, until one of the other children should attain a vested interest, and that on that event the two who would have attained vested interests would be jointly entitled to the rents and profits of the leasehold house until the third child should attain a vested interest. The order did not give any direction as to the income when all the children should have attained vested interests, because then they would have become absolutely entitled to the *corpus*.

(1) W. N. (1879) 135. (2) [1891] 1 Ch. 671.

The other case I wish to refer to is that of *Shepherd* v. *Ingram* (1). In that case a testator gave his estate to trustees, and, as to his residue, after provision for annuities and legacies, he gave the same to such child or children as his daughter, *Frances Gibson* or *Shepherd*, should have of her body lawfully begotten, whether male or female, equally to be divided between them, share and share alike. The bill was filed by *Frances Gibson*, who was then unmarried, and in 1750 it came before Lord *Hardwicke*, and, as appears by the report of that case—*Gibson* v. *Rogers* (2)—the income was directed to be accumulated. The accumulation took place accordingly. Afterwards, in August, 1758, she married Lord *Irwin*, and when the matter came before the Court again in 1764, there were three children of the marriage, all infants. *Shepherd* v. *Ingram* was a bill by two of the children, the third being a defendant, to have it decided who were entitled to the accumulations. The plaintiffs prayed to have an account of the income; and a declaration that so much of it as became due from the birth of the first child till the second was born belonged to the first; and so much of it as became due from the birth of the second child till the third was born belonged to the first and second; and that so much as became due after the third was born belonged to all the three children. The judgment of Lord Chancellor *Northington* is put very shortly thus (3): He "was very clear that the daughters took a defeasible interest in the residue"—defeasible in this sense, that other children might be born and diminish their shares; "and put the case of a legal devise of the residue to the daughters, with a subsequent clause declaring, that if all the daughters should die in the lifetime of their mother, then the residue should go over, that would be an absolute devise with a defeasible clause, and the daughters would in that case be clearly intitled to the interest and profits till that contingency happened; and decreed according to the prayer of the bill," which I have read, "with liberty to apply in case of the birth of any other child."

The illustration he gave was different from that case and

(1) Amb. 448. (2) Amb. 92.
(3) Amb. 450.

NORTH, J.
1892
In re ADAMS.
ADAMS *v.* ADAMS.

from the present. But the case he decided seems to me very like the present. The distinction between that and the present case is alleged to be that there the vesting took place on birth. Whether the vesting takes place on birth, subject to being divested on death under the age of twenty-one; or whether it takes place only on the attainment of twenty-one; seems to me a matter of detail, and not of principle. Supposing, what might have happened in the present case, *Thomas*, the testator's brother, had been alive, and the gift had been to all the children of *Thomas*; supposing *Thomas* had had one child at the death of the testator, such child clearly would have taken a vested interest in the whole residue; supposing a second child born after the death of the testator, according to *Shepherd* v. *Ingram* (1), the vested interest of the eldest child in the whole would have been divested, and he would have been entitled instead to a vested interest in one half; on the birth of a third or a fourth child, and on the occasion of the birth of every subsequent child, a similar result would have taken place—a vested interest would have become divested. That seems very like the present case. I considered *Shepherd* v. *Ingram* in point in *In re Jeffery* (2). I consider it so still, and that it is binding on me. But there is a remarkable distinction between the present case and *In re Jeffery*. There some of the children had attained a vested interest; here no child has. How does the matter stand as to the income? It is said that they take an interest in that also. I think it is fallacious to say that they take an interest in the income, *quâ* income of the capital they have an interest in. But it is undisposed of income, and as such becomes part of the residue. At the present time it cannot be said that any child will take any part of the income, because it cannot be said that he will take any part of the residue; but, being part of the residue, the income belongs contingently to the children, in the same way as the capital belongs contingently to them. That being so, in my opinion the income is income to which the children are contingently entitled, and of property to which they are contingently entitled, and may be applied to their maintenance under the *Conveyancing Act*, 1881, s. 43. That was the view Mr. Justice

(1) Amb. 448. (2) [1891] 1 Ch. 671.

Chitty took in *In re Burton's Will* (1). There were in that case two children under age, and he held that the income was applicable for their maintenance. I go with him to this extent, that the income here is applicable for the maintenance of the infant children down to the time when a vested interest comes into existence. He did not stop at that point. I do not see my way to go beyond that. In respect of the income, while there is no vested interest, I hold that it is applicable to the maintenance of the infants. That will carry them on to some time in 1895. I need not decide what will happen then. It may possibly be settled by some decision of the Court of Appeal that even after that time the infants have still some interest in the income. It may be that the eldest child will be willing to allow a portion of the income to be applied for the maintenance of the others. That being so, I declare that the income is applicable to the maintenance of all the children till one of them attains twenty-one, or, being a daughter, marries.

Solicitors for all parties: *Ingle, Cooper, & Holmes.*

D. P.

FURNIVALL *v.* HUDSON.

[1892 F. 2001.]

Bill of Sale—Power of Attorney—Bills of Sale Act (1878) *Amendment Act*, 1882 (45 & 46 *Vict. c.* 43), *s.* 10.

A valid bill of sale may be executed by attorney, and the grantee is not necessarily excluded from being such attorney.

A deed empowered a creditor, on default of stipulated payment by the debtor, to tender to the debtor a bill of sale for execution, and in case of non-execution for seven days to execute the bill as attorney for the debtor. The Court refused to restrain the grantor from putting in force the power.

THE Plaintiffs to this action were Colonel *W. G. Furnivall*, and Colonel *W. R. Truman*, partners in an undertaking called the *National Conservative Club*, carried on at leasehold premises at *Pall Mall*. The Defendant was *W. C. Hudson*, a wine

(1) [1892] 2 Ch. 38.

NORTH, J. 1892 FURNIVALL v. HUDSON.

merchant who had, previously to the partnership, advanced a sum of money to Colonel *Furnivall*, on terms of an indenture, dated October, 1890.

An indenture of four parts, dated May, 1891, expressed to be supplemental to the indenture of October, 1890, was executed between Colonel *Furnivall*, Colonel *Truman*, his wife, and the Defendant. It recited that there was then due on the security of the indenture of October, 1890, £1947, and a bonus of £1000. It witnessed (1.) that the principal indenture of October, 1890, was cancelled. (2.) That Colonel *Furnivall* and Colonel *Truman* jointly and severally covenanted to pay to the Defendant £1947, and interest thereon at 5 per cent. per annum, and the bonus of £1000 (without interest) by instalments at dates therein mentioned; (3.) that (among other things) in case of default for ten days in payment of an instalment, the principal debt and bonus should become due. Art. 5 of the witnessing part, the only other material clause of the deed, was as follows:—

"The said principal interest and bonus are hereby (subject to the prior incumbrances affecting the same) charged upon the lease, goodwill, book debts and other assets (other than furniture and chattels), referred to in the principal indenture of the said Conservative Club, and the said *W. G. Furnivall* and *W. R. Truman*, and each of them will at their and his own cost whenever requested so to do, while any part of the said principal interest and bonus remains unpaid, execute to the said *W. C. Hudson*, his executors, administrators, and assigns, a proper legal mortgage or mortgages of the said premises hereinbefore charged, and after default in payment of any of the instalments mentioned in clause 2 hereof, a bill of sale or bills of sale of the furniture, and all other chattels which now are or shall at any time during the period aforesaid, be in upon or about the said club premises, or any other premises where the said club may be carried on or used in connection with the business thereof; and such mortgage or mortgages, bill of sale or bills of sale, shall be in such form as the solicitors for the time being of the said *W. C. Hudson* may reasonably require; and should the said *W. G. Furnivall* and *W. R. Truman*, neglect or refuse, within seven days after notice requiring them to do so, left for them

upon the club premises, to execute any such mortgage or mortgages, bill of sale or bills of sale, the said *W. G. Furnivall* and *W. R. Truman*, and each of them hereby irrevocably appoints the said *W. C. Hudson* their and his attorney for them and him, and in their and his behalf, and as their and his act and deed to make, execute and deliver every or any such further mortgage or mortgages, bill of sale or bills of sale as aforesaid."

It was admitted for the purpose of this application that default had been made in payment of an instalment covenanted by the Plaintiffs to be paid to the Defendant, and the Defendant *Hudson* had, on the 2nd of December, 1892, tendered a bill of sale to the Plaintiffs at the *National Conservative Club* for execution within seven days, and the Plaintiffs not having executed such bill of sale, the Defendant's solicitors had given notice that he intended on the 10th of December, 1892, to execute the proposed bill of sale as the Plaintiffs' attorney, if it were not previously executed by them.

The bill of sale tendered comprised the chattels at the clubhouse; it provided that the mortgagees would on demand in writing sent by post, or left addressed to them or one of them, at the *National Conservative Club*, pay the principal sum then due with interest and the arrears. It was not, therefore, in the form given in the schedule to the *Bills of Sale Act* (1878) *Amendment Act*, 1882, which requires that a particular time or particular times for payment must be stipulated.

The object of the action was to restrain the Defendant from executing the bill of sale as the attorney of the Plaintiffs. The action was brought on motion for an interlocutory injunction in accordance with the claim.

Corner, for the Plaintiffs:—

It is contrary to the scope and intent of the *Bills of Sale Acts* that a bill of sale should in any case be executed otherwise than by the grantor in person. It would have been impossible to comply with sect. 10, sub-sect. 1, of the Act of 1878 without the actual presence of the grantor at the execution of the deed; because it was necessary that the execution should be attested by a solicitor who, at the same time, explained the effect of the

NORTH, J. 1892 FURNIVALL v. HUDSON.

document to the grantor. The words in the substituted sect. 10 of the Act of 1882 and the form of the instrument given in the schedule to the Act do not provide for or seem to contemplate an execution otherwise than in person.

If in any case a bill of sale can be duly executed by a power of attorney it is necessary that the attorney should be a stranger to the deed, and not the grantee; and to allow the grantee at his will to act as the attorney of his debtor would be harsh and unreasonable; would open a door for the mischief aimed at by the Act; and be contrary to the spirit thereof.

In the third place, in any event, the Plaintiffs are entitled to an injunction to restrain the Defendant from executing the particular bill which has been tendered to the Plaintiffs, because it provides for payment of the debt on demand: *Hetherington* v. *Groome* (1).

[Counsel for the Defendant were called on to argue the third point, and Mr. Justice *North* decided that the bill of sale that had been tendered was in an invalid form under the decision in *Hetherington* v. *Groome*.]

Cozens-Hardy, Q.C. (*Spence*, with him), for the Defendant:—

The injunction will be limited to restraining the Defendant from executing a bill of sale in which it is provided that the debt is payable on demand.

Corner:—

It is expedient that a decision be now given upon the other two points; because, if they are left open, the Defendant may tender a fresh bill of sale outside the decision of *Hetherington* v. *Groome*, and the parties would then be put to the expense and inconvenience of a fresh action.

Cozens-Hardy, Q.C., and *Spence*:—

There is no reason in the nature of the instrument why a bill of sale should not be as well executed by an attorney as any other deed. There is nothing in the Act of 1882, or any sub-

(1) 13 Q. B. D. 789.

sisting enactment, in the slightest degree to militate against this view. If there were any difficulty under sect. 10 of the Act of 1878, which, according to our contention, is not the case, that difficulty has been entirely removed by the repeal of the section.

Nor is there any reason in law or justice or convenience why the grantee should not be himself the attorney where the grantors are protected as well as they are in this case by the deed creating the power; they are to receive full notice, and have every opportunity of seeing that the proposed bill of sale is fairly reasonable, and it must be remembered that the effect of the deed in this respect is only to enable the grantee to do for himself that which by process of law he could have compelled the grantors to do, or, on their default, to get done by an order of the Court.

Corner, in reply.

NORTH, J.:—

In my opinion, the first two points taken by the Plaintiffs are not well founded. The first is that a bill of sale must be executed by the debtor himself, and not by attorney; and the second is that, even if it can be executed by an attorney at all, the grantee cannot himself be the attorney of the grantor for that purpose. I have decided that the bill of sale is not such as would, if executed by the grantors themselves, be a valid bill of sale, and that the grantee cannot proceed upon this bill of sale. But the result of that would be that, although the grantee is restrained from proceeding to execute the bill of sale that has been tendered, he might tender a new bill of sale, unimpeachable in form; and subsequently, if it were not executed by the grantees, proceed to execute it as their attorney. It is, therefore, right that I should decide the other two points, and not put the parties to fresh litigation on the question. I do not find anything in the *Bills of Sale Acts* requiring me to hold that a bill of sale cannot be executed by an attorney under a power. The relevant section which defines what is to be done by way of attestation, is sect. 10 of the Act of 1882: it provides that "the

NORTH, J.
1892
FURNIVALL
v.
HUDSON.

execution of every bill of sale by the grantor shall be attested by one or more credible witness or witnesses, not being a party or parties thereto." Now, a deed is just as much executed by the grantor, if executed by an attorney duly constituted, as if it were executed by the grantor personally. Then, when you turn to the form of the instrument given in the schedule to the Act, there is nothing that I see to shew that the instrument must be executed by the grantor in person and not by attorney. Under sect. 10 of the Act of 1878 it may be that it would have been difficult to comply with what was provided, unless the grantor was present at the execution of the instrument; but that enactment has been deliberately repealed and cannot be relied on as an argument as to what is necessary now. In my opinion, therefore, there is nothing to shew that a bill of sale otherwise unobjectionable cannot be duly executed by an attorney. Then it is said that the grantee must not be the attorney, as his being so would be against the spirit of the Act. There is much in favour of that argument as a general rule. But to consider whether that is so in this case, the terms of the charge given by the debtors in the instrument containing the power must be looked at. It is wrong to say that the bill to be tendered for execution is anything that the grantee may require: first, it is to be according to law; and it is to be such as the solicitors of *Hudson* may reasonably require. Then it is not a power which the creditor can exercise behind the backs of the debtors. He must tender the bill of sale to them, for execution by them, and the debtors have at least seven days in which to object to anything they can object to. I do not see that there is anything inequitable in providing by contract that the grantee shall be the person to sign on behalf of the grantors an instrument which has been submitted to them for their consideration before being executed, and to which they have not made any valid objection. If they refused to execute a proper bill of sale, the grantee might come to the Court for an order that they should execute it, and if they did not the Court could, under sect. 14 of the *Judicature Act*, 1884, nominate a person to execute it for them. What has been done is simply to displace by contract the necessity for coming to the Court for specific performance.

I think, therefore, the objection to the form of the instrument alone is tenable, and the injunction must be limited to restraining the Defendant from executing this bill of sale, as not being according to the Act.

Solicitors for Plaintiffs: *Saunders, Hawksford, Bennett, & Co.*
Solicitors for Defendant: *Heather & Sons.*

D. P.

STIRLING, J. *In re* BIRMINGHAM AND DISTRICT LAND COMPANY AND ALLDAY.

1892

Oct. 28, 29; *Nov.* 2.

Vendor and Purchaser—Building Land—Sale in Lots by Auction—Restrictive Covenants—Retainer of other Lands by Vendor—Unsold Lots—Liability of Vendors to observe Restrictive Covenants—Form of Conveyance to Purchaser.

Where a vendor puts up building land for sale in lots subject to restrictive covenants, it is a question of fact to be deduced from all the circumstances of the case whether the restrictions are merely matters of agreement between him and his vendees, imposed for his own benefit and protection, or are meant by him and understood by the buyers to be for the common advantage of the several purchasers; and the retainer by the vendor of some part of the property is only an element, though an important one, to be taken into consideration with other circumstances in ascertaining the intention; for though the vendor may not part with his whole estate, there may be circumstances which shew that the intention was that each purchaser should be entitled to enforce the restriction against the vendor himself as well as against purchasers.

A land company put up freehold building sites for sale by auction in lots, subject to particulars and conditions of sale which, in the view of the Court, constituted an invitation to the public to come in and purchase on the footing that the whole of the property offered for sale was to be bound by one general law affecting the character of the buildings to be erected thereon. At the auction some of the lots were sold and some were not, and after the sale the vendors claimed the right to sell the unsold lots free from the restrictive covenants in case they desired to do so:—

Held, that a purchaser who had bought one of the lots sold at the auction, but had not completed his purchase, was entitled to the benefit of a contract by the vendors implied in the conditions of sale—that the vendors would, as to the lots unsold at the auction, observe stipulations similar to those which the purchasers of those lots, had they been sold, would have been bound to covenant to observe; and *held*, also, that the purchaser was entitled to have such obligations of the vendors expressed in the conveyance to him of his lot.

Nottingham Patent Brick and Tile Company v. *Butler* (1) discussed and explained.

SUMMONS under the *Vendor and Purchaser Act*, 1874.

On the 5th of November, 1891, the *Birmingham and District Land Company* put up for sale by auction in twenty-two lots a piece of freehold land at *Moseley*, in the county of *Worcester*,

(1) 15 Q. B. D. 261; 16 Q. B. D. 778.

about two miles from *Birmingham*, according to particulars and a plan, and subject to certain conditions of sale. The particulars and plan were headed, "Particulars and plan of valuable building sites, in suitable lots for the erection of small villas, situate in *Cadbury Road*; and a few plots in *Stoney Lane* and *Anderton Park Road*." They then described the property offered for sale as "A small freehold estate, divided into twenty-two convenient lots of sound building sites, having frontages of 13 yards and upwards, and mean depths of 40 yards, the lots varying in quantities from 289 square yards to 2182 square yards. The building restriction being £250 per house." The particulars next specified the locality, frontage, and contents in square yards of each of the various lots, and then stated, "These eligible plots of land, which are quite ripe for building operations, are pleasantly situated in a most desirable neighbourhood, and for the greater part fronting a newly-made road (which is properly curbed, channelled, and sewered in accordance with the requirements of the sanitary authority), and the whole are admirably adapted for the erection of a class of houses to be let at moderate rentals, for which there is considerable demand in this salubrious locality."

The plan shewed that the piece of land out of part of the area of which the lots had been made was in the shape of a triangle, the base of which was formed by *Cadbury Road* and the lots fronting thereon, and the sides by *Anderton Park Road* and *Stoney Lane*, and it appeared that between the apex and the base of the triangle there ran across the property from *Anderton Park Road* to *Stoney Lane* a piece of land belonging or having formerly belonged to the vendors, upon which thirteen villas fronting either in *Anderton Park Road* or *Stoney Lane* had been erected, which piece of land separated some of the lots offered for sale from the others.

All the lots fronted on one or other of the three roads, and the plan shewed that the villas had been erected according to a building line which was marked as continuing across such of the lots offered for sale as fronted in the same direction with the villas. The plan also shewed that other houses had been built on adjoining lands, apparently of the vendors, and these villas and

STIRLING, J. houses were marked with names such as might be given to dwelling-houses of the same character as the houses for the erection of which the lots to be sold were stated to be suitable.

1892

In re BIRMINGHAM AND DISTRICT LAND COMPANY AND ALLDAY.

Of the conditions of sale, the only material one was the 11th, which was as follows:—

"Each purchaser in the assurance to him of the property purchased by him shall covenant with the vendors, their successors and assigns, and also by way of separate covenant with the other conveying parties (if any), their heirs and assigns, as follows: That no buildings other than dwelling-houses with necessary out-buildings shall be erected or built upon the land purchased by him. And that every such dwelling-house and out-building shall, in the erection and completion thereof, cost not less than the sum of £250, and that no house shall be used for any other purpose than as a private dwelling-house. That no building shall be erected upon any of the lots fronting to *Anderton Park Road* and *Stoney Lane* respectively within the building line as shewn upon the plan annexed to the particulars, so that the line of the buildings now standing upon the other land of the vendors fronting *Anderton Park Road* and *Stoney Lane* respectively shall be observed, and that no building shall be erected upon any of the lots fronting to *Cadbury Road* within the building line as shewn upon the said plan being at a distance of three yards back from *Cadbury Road*."

At the auction some of the lots put up for sale were sold, *William Allday* being the purchaser of one of them, viz., lot 15. The remainder, twelve in number, were unsold. *Allday* accepted the vendors' title, and required the vendors to convey to him the lot he had purchased together with the benefit of the contract of the vendors, implied in the conditions of sale, that the vendors would, as to the then unsold lots, observe and abide by stipulations similar to those which the purchaser was by the conditions of sale to enter into with the vendors. The vendors declined to admit such a grant in the conveyance, and maintained their right to sell the lots unsold at the sale without any building restriction in case they thought it desirable to do so. The purchaser then took out this summons for a declaration that he was entitled

to the benefit of a contract by the vendors implied in the conditions of sale, that they would as to the lots unsold at the auction observe and abide by stipulations similar to those which the purchasers of the unsold lots had they been sold at the auction would have been bound to covenant that they would observe and abide by; and also that he was entitled to have the obligations of the vendors in respect of the unsold lots expressed in and made binding by his conveyance.

T. C. Wright, for the purchaser, in support of the summons:—

On the face of the particulars, plan, and conditions, this was a building estate, subject to one general law, imposing upon every purchaser certain restrictions. Certain lots forming part of this building estate were put up for sale; some of them were and others were not sold. Under these circumstances there is an implied contract between the vendors and each of the purchasers of the lots sold that the vendors will not use or treat the lots unsold in a manner inconsistent with the restrictions of the building scheme: *Renals* v. *Cowlishaw* (1); *Spicer* v. *Martin* (2); *Mackenzie* v. *Childers* (3). The vendors might, if they had chosen to do so, have expressly reserved to themselves the right of selling the unsold lots under different arrangements, and either subject to or free from the restrictive stipulations applicable to the then sale: *Sidney* v. *Clarkson* (4). But they did not do so; and the purchaser is entitled to have from them a recognition of his rights on the face of his conveyance.

Hastings, Q.C., and *Henry Fellows*, for the vendors:—

Where a vendor purposes to sell in lots a building estate as a whole, and puts it up under restrictive conditions, then no doubt the inference arises that such covenants are for the common benefit of the purchasers. But where a portion only of a building estate is put up, and the vendor retains in his own hands adjoining property, no implied covenant arises against him as regards any property not sold or retained by him. In such a case the presumption is that the conditions were inserted

(1) 9 Ch. D. 125.
(2) 34 Ch. D. 1; 14 App. Cas. 12.
(3) 43 Ch. D. 265.
(4) 35 Beav. 118.

STIRLING, J. 1892 In re BIRMINGHAM AND DISTRICT LAND COMPANY AND ALLDAY.

and the contract entered for his own benefit only, and the purchasers cannot claim the benefit of them as against him: *Nottingham Patent Brick and Tile Company* v. *Butler* (1).

T. C. Wright, in reply.

1892. Nov. 2. STIRLING, J.:—

This is a summons under the *Vendor and Purchaser Act*, 1874, raising a question as to the form of the conveyance on a purchase, but in reality, as has been very fairly admitted by the counsel for the vendors, a question as to the rights of the purchaser under his contract. Before completion of the purchase the vendors set up a claim to be able to sell the unsold lots free from the restrictive conditions under which the purchaser bought. This right is disputed by the purchaser, who insists that the conveyance shall contain words sufficient to negative the claims of the vendors. The question whether the contention of the vendors or that of the purchaser ought to prevail is the substantial question which I have to decide upon this summons. On behalf of the purchaser, reliance was placed on the statement of the law made by Lord *Macnaghten* in advising the House of Lords in the case of *Spicer* v. *Martin* (2). He said (3): "If the site of the houses now known as *Cromwell Gardens* had been put up for sale by auction in building lots, according to a plan corresponding with that on Mr. *Martin's* lease, and if the conditions of sale had prescribed that houses should be built such as those which have actually been erected, and that every purchaser should bind himself by a covenant, in the terms of the restrictive covenant now in question, no one, I think, could have doubted that each purchaser would, as against the vendor, and as against every co-purchaser, have had a right to the benefit of the covenant, although there might have been no direct stipulation to that effect, and no express provision for mutual covenants by the purchasers *inter se*." And further on he says: "It seems to me that when Mr. *Spicer* put his houses in *Cromwell Gardens* on the market he invited the public to come in and take a portion of an estate which was

(1) 15 Q. B. D. 261; 16 Q. B. D. 778. (2) 14 App. Cas. 12.
(3) 14 App. Cas. 24.

bound by one general law—a law perfectly well understood, and one calculated and intended to add to the security of the lessees, and consequently to increase the price of the houses. The benefit of that increase, whatever it was, Mr. *Spicer* got. Can he or his representative be permitted to destroy the value of the thing he sold by authorizing the use of part of the estate for a purpose inconsistent with the law by which he professed to bind the whole?"

It was not disputed by the counsel for the vendors that if the doctrine thus laid down applies, the purchaser is in the right; but it is said that such doctrine is inapplicable, because it is apparent on the face of the particulars and conditions of sale that the vendors retained in their own hands adjacent lands of considerable extent, and that these restrictive stipulations must be taken to have been introduced for the protection of the property held by them. In support of that, they rely on the judgment of Lord *Esher*, M.R., in *Nottingham Patent Brick and Tile Company* v. *Butler* (1). I will refer first to the judgment in that case given in the Court below by Mr. Justice *Wills*, which was approved of by Lord Justice *Lindley*, as being a correct statement of the law. He says (2): "The principle which appears to me to be deducible from the cases is that where the same vendor selling to several persons plots of land, parts of a larger property, exacts from each of them covenants imposing restrictions on the use of the plots sold without putting himself under any corresponding obligation, it is a question of fact whether the restrictions are merely matters of agreement between the vendor himself and his vendees, imposed for his own benefit and protection, or are meant by him and understood by the buyers to be for the common advantage of the several purchasers. If the restrictive covenants are simply for the benefit of the vendor, purchasers of other plots of land from the vendor cannot claim to take advantage of them. If they are meant for the common advantage of a set of purchasers, such purchasers and their assigns may enforce them *inter se* for their own benefit." Then he says (3): "It appears to me that, where land is put up to auction in lots, and

(1) 16 Q. B. D. 778. (2) 15 Q. B. D. 268.
(3) 15 Q. B. D. 269.

STIRLING, J. 1892 *In re* BIRMINGHAM AND DISTRICT LAND COMPANY AND ALLDAY.

two or more persons purchase according to conditions of sale containing restrictions of the character of those under consideration in the present case, it is very difficult to resist the inference that they were intended for the common benefit of such purchasers, especially where the vendor purposes (as in the present case) to sell the whole of his property. Where he retains none, how can the covenants be for his benefit; and for what purpose can they be proposed except that each purchaser, expecting the benefit of them as against his neighbours, may be willing on that account to pay a higher price for his land than if he bought at the risk of whatever use his neighbours might choose to put his property to? Where, therefore, the vendor desires to sell at the auction the whole of his property, the inference is strong that such covenants are for the common benefit of the purchasers; and it seems to me that the strength of this evidence is not diminished by the fact that at the sale a considerable number of the lots may fail to find purchasers." When the case was heard on appeal, Lord *Esher*, M.R., in the course of his judgment, said this (1): "I think that Mr. Justice *Wills*' view of the law on this subject is perfectly correct. In my view he is right in saying that, when an estate is put up for sale in lots, subject to a condition that restrictive covenants are to be entered into by each of the purchasers with the vendor, and the vendor is intending at that sale to sell the whole of the property, the question whether it is intended that each of the purchasers shall be liable in respect of those restrictive covenants to each of the other purchasers, is a question of fact, to be determined by the intention of the vendor and of the purchasers, and that question must be determined upon the same rules of evidence as every other question of intention. And, if it is found that it was the intention that the purchasers should be bound by the covenants *inter se*, a Court of Equity will, in favour of any one of the purchasers, insist upon the performance of the covenants by any other of them, and will do so under such circumstances without introducing the vendor into the matter." Then he says (2): "There are two lines of cases to be found in the books. The first is where there has been a sale of part of a property, with no then existing in-

(1) 16 Q. B. D. 784. (2) 16 Q. B. D. 785.

tention of selling the rest, and subsequently there is a sale of another part; then, as regards the later sale, you cannot look at the conditions of the former sale, you must look only at the conditions relating to the later sale. The other line of cases is where the whole of a property is put up for sale (not necessarily under a building scheme), but is put up for sale in lots, subject to certain restrictive covenants; then it is a question of fact whether it was or was not the intention that the restrictive covenants should be entered into for the benefit of each of the purchasers as against all the others, and it is a most material circumstance whether the vendor reserves any part of the property for himself. If he does not reserve any part, that is almost if not quite conclusive (unless there is something contradictory) that the covenants which he takes from the purchasers are intended for the benefit of each purchaser as against the others." The judgments of the Lords Justices do not go any further; but Lord Justice *Lindley* expressly approves the statement of the law as given by Mr. Justice *Wills*.

That case is cited as an authority for the contention that the restrictive covenants are only enforceable by a purchaser when the vendor sells the whole of the property. I cannot come to that conclusion. I take the same view as Mr. Justice *Wills*, that it is a question of fact, to be deduced from all the circumstances of the case, whether the restrictions are merely matters of agreement between the vendor himself and his vendees, imposed for his own benefit and protection, or are meant by him and understood by the buyers to be for the common advantage of the several purchasers. The Master of the Rolls seems to have been of that opinion also, though in the judgment referred to he was speaking of a case where the vendees disposed of the whole estate. He says that if the vendor does not reserve any part, "that is almost if not quite conclusive (unless there is something contradictory)"; but that language appears to concede that the conclusion may be rebutted by something else. Though the retainer by the vendor of some part of the property is a highly important element, it is after all only an element to be taken into consideration along with other circumstances in ascertaining the intention. It appears

STIRLING, J. 1892 *In re* BIRMINGHAM AND DISTRICT LAND COMPANY AND ALLDAY.

to me that although the vendor may not part with his whole estate, there may be circumstances which shew that the intention was that each purchaser should be entitled to enforce building restrictions against the vendor and every other purchaser. That being so, let us turn to the particulars and conditions in this case. [His Lordship then read the description in the particulars of the property offered for sale, and continued:—]

Stopping there, what would a purchaser infer from looking at the particulars and plan? Admitting that it appears (as it certainly does appear), from the plan and conditions, that the vendors were owners of other property in the immediate neighbourhood, it is still to be borne in mind that the owners of building estates in the neighbourhood of large towns do not throw the whole of their estates on the market at once; and, further, that they do not devote the whole estate to the erection of the same class of houses, but very often appropriate one portion to one class and another portion to another class, and that these various plots do not, in the language of the particulars, become "ripe for building operations" at the same time, and that considerations of this kind apply with not less force when the vendor is a land company, presumably dealing with land for purposes of sale, and not for the purpose of retention as a permanent investment. It would seem to me, then, that a purchaser would naturally infer that this property described as "a small freehold estate" had been selected by the vendors from the larger property belonging to them to be devoted to the erection of houses of a particular class. But turning to the restrictive conditions, we find condition 11 to be this. [His Lordship read the condition, and continued:—]

These restrictive conditions provide in substance (1.) for the erection of private dwelling-houses only; (2.) for a minimum value as regarded each house erected; and (3.) for adherence to a building line, stated to be already existing as regards buildings on other land of the vendors. Now, the plan annexed to the particulars shews each lot on the adjoining land of the vendors' as having a house erected on it, and, in most cases, as bearing a name adapted to a villa residence of the class usually

found in the neighbourhood of large towns; but there is no indication of their value. It may however fairly be assumed, as against the vendors, that those houses were of a value equal to or exceeding the minimum. As regards the land thus retained by the vendors, the intending purchaser would see that the building conditions had already been complied with; and the inference which I have already suggested as that likely to occur to his mind upon reading the particulars would be strengthened. It seems to me, therefore, that these particulars and conditions constituted (in the language of Lord *Macnaghten* in *Spicer* v. *Martin* (1)) an invitation to the public to come in and purchase on the footing that the whole of the property offered for sale was to be bound by one general law affecting the character of the buildings to be erected thereon; and that the vendors ought not to be allowed to destroy the value of that which was sold by authorizing the use of a part of the property for a purpose inconsistent with the law by which they purported to bind the whole. It is said, and, indeed, the secretary of the company has sworn, that the company never intended to give the purchaser the benefit claimed by him. Upon that, it is to be remarked that, whereas a purchaser cannot dive into the recesses of a vendor's mind, a vendor offering property always has it in his power to make his intentions clear; and it is his duty so to do. It has long been the practice for vendors, whose intentions are such as stated in the present case, to reserve, by express conditions, power to make future sales discharged from restrictive conditions. An example is to be found in the case, cited in argument, of *Sidney* v. *Clarkson* (2) relating to a sale in the year 1865. I do not, of course, mean, that the vendor cannot indicate his intention in other ways; but this consideration appears to me to relieve such cases of any element of hardship to which weight might otherwise attach. I may add, that the remarks of Lord *Langdale* in *Peacock* v. *Penson* (3) and the case of *Collins* v. *Castle* (4), appear to support the view which I have taken. I make a declaration that the Applicant *Allday* is entitled to the benefit of a contract by the vendors,

(1) 14 App. Cas. 12.
(2) 35 Beav 118.
(3) 11 Beav. 355, 359.
(4) 36 Ch. D. 243.

STIRLING, J. 1892 *In re* BIRMINGHAM AND DISTRICT LAND COMPANY AND ALLDAY.

implied in the conditions of sale; that the vendors, as to lots unsold at the auction at which *Allday* bought, are bound to observe and abide by stipulations similar to those which the purchasers of those lots, had they been sold at the auction, would have been bound to covenant that they would observe and abide by, and that *Allday* is entitled to have such obligations of the vendors expressed in the conveyance to him of his lot.

Solicitors; *Harvey & Capron*, agents for *E. C. Newey, Birmingham; Stibbard, Gibson & Co.*, agents for *Rowlands & Co., Birmingham.*

W. W. K.

STIRLING, J. 1892 *Oct.* 27; *Nov.* 12.

In re INGHAM. JONES *v.* INGHAM.

[1890 I. 1604.]

Mortgages—Priority—Co-Executors and Legatees in trust of Mortgagee—Negligence by one of them—Subsequent Incumbrances by Mortgagor—Title to Deeds.

Under the will of a mortgagee of two leasehold properties, who died in 1880, *A.* and *B.* were executors and joint devisees and legatees of trust and mortgage estates, and *A.* was entitled to a life interest in all the testator's own property, with remainder to *B.* In 1884 the mortgagor told *A.*, who had possession of the title-deeds of the mortgaged property, and was pressing for repayment of the mortgage debt, that he could not borrow the money to pay it off unless the title-deeds were sent to him; and *A.*, without *B.'s* knowledge, sent the mortgagor a parcel containing the title-deeds, which consisted of two assignments and one mortgage, in order to enable him to raise money to pay off the mortgage debt or part of it. The mortgagor did not pay off any part of the mortgage debt, but after some time he returned to *A.* a parcel which was supposed to contain the deeds.

After *A.'s* death in 1890 it was found that the parcel returned contained the mortgage-deed only, and that the mortgagor had purported to execute a legal mortgage in favour of a bank, to secure money lent to him by them without notice of the existing mortgage, and had handed over the two assignments to them.

In an action for the administration of the mortgagor's estate it was

Held, that whatever rights the bank might have had against *A.*, the acts of *A.* did not preclude *B.* from setting up his legal title as surviving executor and devisee and legatee of the mortgage estate of the testator,

and that *B.* was entitled to priority over the bank in respect of the mortgage of 1879; and

Held, also, that the bank must deliver up to *B.*, as the surviving executor and legal owner of the mortgaged property, the title-deeds in their possession.

STIRLING, J.

1892

In re INGHAM.

JONES *v.* INGHAM.

THIS was the further consideration of a creditor's action for the administration of the estate of *Thomas Ingham* deceased, in which the usual judgment had been given. Two creditors, viz. *Thomas William Pedley*, the surviving executor of *John Pedley* deceased, and the *National Bank of Wales*, claimed to be entitled to securities for their debts on a portion of *Thomas Ingham's* estate, and had carried in claims accordingly. The estate was insufficient to pay them both in full; and the question was which of them was entitled to priority.

The facts were as follows:—

By two several indentures dated respectively the 9th of March, 1872, and the 30th of August, 1872, two distinct leasehold properties were assigned to *Thomas Ingham*. In 1879 *Thomas Ingham* borrowed £650 of *John Pedley*, and to secure repayment of that sum executed in *Pedley's* favour a legal mortgage, dated the 29th of September, 1879, of both leasehold properties, and handed over to *Pedley*, as such mortgagee, the two above-mentioned deeds of assignment. About the same time *Thomas Ingham* borrowed of *Pedley* a further sum of £150, the repayment of which was secured by three promissory notes for £50 each. On the 3rd of September, 1880, *John Pedley* died. By his will, which was dated the 3rd of July, 1875, *John Pedley* appointed his widow, *Ann Pedley*, and the claimant, *Thomas William Pedley*, his executrix and executor, and devised and bequeathed all his real and personal estate to *Ann Pedley* for life, with remainder to *Thomas William Pedley*; and he devised and bequeathed all estates vested in him as trustee or mortgagee to *Ann Pedley* and *Thomas William Pedley* as joint tenants upon the usual trusts.

Ann Pedley and *Thomas William Pedley* duly proved the will; and the two assignments of 1872, and the mortgage of 1879, which had been in possession of *John Pedley*, were after his death taken possession of by *Ann Pedley*, and remained in her custody

STIRLING, J. 1892 *In re* INGHAM. JONES *v.* INGHAM.

down to the year 1884. *Ann Pedley* employed one *Aaron Tunnicliffe* to collect for her the income which she was entitled to receive under her husband's will, including the interest on the mortgage debt of £650 and the three promissory notes for £50 each. In 1884, as *Tunnicliffe* stated in his evidence, he, by the directions of *Ann Pedley*, pressed *Ingham* for payment of the £800 so due; and, in answer to an application, *Ingham* wrote to *Tunnicliffe* a letter dated the 10th of June, 1884, in the following terms:—

"Memorandum. From *T. Ingham*, 102, *Denbigh Terrace, High Street, Llanberis*, to Mr. *Tunnicliffe, Nantwich.*

"Dear Sir,—I arrived home last night, but too late for post, and found your letter amongst others waiting me, in reply to which I beg to say that I have done all in my power to borrow the money to pay Mrs. *Pedley*, but so far have failed, and that for the following reason—namely, that those people who had money by them have this last three years about formed a kind of 'Ship Club,' and have bought some ships, and those have turned out so favourable, paying from ten to twenty per cent., that everybody save up their money and buy shares in these ships, so that you can't borrow a £100 from any one except a 'Building Society,' for your life hardly. If Mrs. *Pedley* must have the £650 that is on the two shops, I don't see my way now to get them only from some 'building club,' which I will do if she thinks proper. But to get the money in that way, of course I should have to get the 'deeds.' If Mrs. *Pedley* will therefore take an I.O.U. from me for the amount, and let me have the deeds so as to have other deed made from them by the club till I would get the money, I will get it at the least possible delay; or if she will come over for a week (or perhaps it would take a fortnight's time) and bring the deeds with her, and she could have the money to come with her back, and the change of air would certainly do her no harm but very likely do her a great deal of good. Indeed she promised that she would come when she was over last time. Waiting your reply, I am, dear sir, yours respectfully,

"*T. Ingham.*"

STIRLING, J

1892

In re INGHAM. JONES *v.* INGHAM.

Tunnicliffe also gave evidence to the following effect:—

"In the month of May, 1884, the said *Thomas Ingham* came over to *Nantwich*, and I saw him on the said Mrs. *Pedley's* behalf. I again pressed him to pay off the money which was due from him. He then said that if the said deeds—that is to say, the said mortgage deed of the 29th of September, 1879, and the two assignments of the 9th of March, 1872, and the 30th of August, 1872, before mentioned—were sent to him, he would try to borrow £600 from a building club, and pay such £600 of the said mortgage debt of £650 off with the least possible delay, and that he would give a fresh promissory note for the £200 balance of the £800. Mrs. *Pedley* agreed to this offer, and the said *Thomas Ingham* promised to pay the £600 without any delay after the said deeds were sent to him; and if he found that he could not borrow the £600 from a building club, that he would return all the said deeds at once to the said Mrs. *Pedley*, or to me. I say most positively that there was no agreement whatever that any part of the said £800 should be paid off by instalments. Such a mode of paying the said £800, or any part of it, off by instalments was never mentioned or suggested. The whole arrangement before mentioned was made by me personally with the said *Thomas Ingham*.

"On the 6th of June, 1884, I obtained the said deeds from the said Mrs. *Pedley*, and they were made up in a parcel, and were sent by me to the said *Thomas Ingham*, by the general post, with a letter, of which the following is a copy:—

"'*Nantwich*, 6th June, 1884.

"'Dear Sir,—I send you by post the deeds relating to your property. Mrs. *Pedley* is not afraid to trust you with the same, but she thought they might possibly miscarry, and if copies would do the risk would be avoided. Yours truly,

"'Mr. *Ingham*. *A. Tunnicliffe*."

"'P.S.—On hearing the day you will be prepared to pay the £600, we will come over to *Llanberis*. A. T.'"

There was no distinct evidence as to what subsequently took place, but it appeared that in fact *Ingham* never paid off the £650, or any part of the sum due on the mortgage.

STIRLING, J. 1892 In re INGHAM. JONES v. INGHAM.

On the 4th of March, 1890, *Ann Pedley* died. On the 4th of September, 1890, *Thomas Ingham* died intestate.

After the death of *Ann Pedley* the mortgage deed of the 29th of September, 1879, was found by *Thomas William Pedley* amongst her papers wrapped up (as was stated) in a piece of brown paper; but the two assignments of 1872 were not forthcoming. It subsequently appeared that on the 5th of May, 1885, *Thomas Ingham* handed over to the *National Bank of Wales* one of these deeds, executing at the same time what purported to be a legal mortgage of the property comprised in the deed by way of security to the bank for £200; and that on the 19th of August, 1887, he deposited the other deed with the same bank by way of equitable security for £300. Both these sums of £200 and £300 remained due to the bank.

Thomas William Pedley deposed that he had no knowledge of the deeds having been sent to *Ingham* in this way, and there was no evidence to the contrary. There was no evidence to shew when the mortgage deed was returned to *Ann Pedley*. It was stated by *Tunnicliffe* that about the end of 1884 he again pressed *Ingham* for payment of the £150 owing on the promissory notes; and, in the view which the Court took of the facts of the case, it might be conjectured that the mortgage deed had been returned by that time.

Hastings, Q.C., and *Warrington*, for *T. W. Pedley*:—

We rely upon the legal title of *T. W. Pedley*, as surviving executor and devisee and legatee of trust and mortgage estates of *John Pedley*. He has the legal estate; he is also the remainderman; and he has not been guilty of fraud, or of any such negligence or misconduct as to postpone his legal rights to a subsequent equitable incumbrancer: *Evans* v. *Bicknell* (1); *Northern Counties of England Fire Insurance Company* v. *Whipp* (2); *Martinez* v. *Cooper* (3). The deeds were after the death of the original mortgagee properly in the custody of Mrs. *Ann Pedley*, who was an executrix and trustee of the mortgagee; and was during her life the sole beneficiary under his will. Without the know-

(1) 6 Ves. 174. (2) 26 Ch. D. 482.
(3) 2 Russ. 198.

ledge of her co-executor and co-trustee, she parted with the deeds to the mortgagor, not for his own benefit, or for the purpose of conferring upon him any apparent authority to deal with the property: but simply to enable him to pay off the mortgage for the benefit of the mortgagees. Accordingly, authorities like *Perry-Herrick* v. *Attwood* (1) and *Briggs* v. *Jones* (2) do not apply. She did get some of the deeds back; and, no doubt, thought they all had been returned to her. But, even supposing the bank had some equity against *Ann Pedley*, they have none against *T. W. Pedley*. Whether she acted as executrix or as tenant for life, her acts did not bind him or affect his legal title: *Fonblanque* on Equity (3); *Hunt* v. *Elmes* (4); *Ratcliffe* v. *Barnard* (5).

Buckley, Q.C., and *Knowles Corrie*, for the bank :—

Ann Pedley, who had the legal estate just to the same extent to which *T. W. Pedley* had, handed over the deeds to *John Ingham*, the mortgagor, for the express purpose of enabling him to raise money upon them. She constituted him her agent, with authority and power to create the mortgages which the bank lent their money upon, and she clearly could not set up the mortgage of 1879 as against them: *Northern Counties of England Fire Insurance Company* v. *Whipp* (6); *Perry-Herrick* v. *Attwood*; *Briggs* v. *Jones*.

When she thus parted with the deeds, she must be taken to have been acting as one of the two executors of *John Pedley*, the mortgagee, and her acts in that capacity are as binding upon his estate, and upon *T. W. Pedley* as a beneficiary under the will, as if he had concurred in them: *Williams* on Executors (7); *Simpson* v. *Gutteridge* (8). We are accordingly entitled to priority over *T. W. Pedley*; and we have got the title-deeds in our possession and cannot be ordered to give them up: *Wallwyn* v. *Lee* (9).

(1) 2 De G. & J. 21.
(2) Law Rep. 10 Eq. 92.
(3) 5th Ed. Vol. I. p. 166.
(4) 2 D. F. & J. 578; 28 Beav. 631.
(5) Law Rep. 6 Ch. 652.
(6) 26 Ch. D. 482.
(7) 8th Ed. p. 950.
(8) 1 Madd. 609, 616.
(9) 9 Ves. 24.

STIRLING,J 1892 *In re* INGHAM. JONES *v.* INGHAM.

[STIRLING, J., referred to *M'Leod* v. *Drummond* (1); and *Lepard* v. *Vernon* (2).]

Hastings, in reply:—

The bank cannot set up that they were dealing with an executrix of the mortgagee or the agent of any one in that capacity, for they thought they were dealing with the owner of the property, who was the mortgagor: *Sneesby* v. *Thorne* (3). So, if in handing over the deeds she acted as tenant for life, her acts cannot affect our title, as it was not derived through her. And even if she acted as executrix our rights are not affected, because one co-executor is not liable in respect of a devastavit committed by another co-executor, and a parting with the deeds so as to authorize the mortgagor to deal with them for his own benefit would undoubtedly have been a devastavit: *Williams* on Executors (4).

There can be no doubt that the Court has jurisdiction to order the bank to deliver up the deeds: *Heath* v. *Crealock* (5); *In re Cooper* (6); *Manners* v. *Mew* (7).

1892. Nov. 12. STIRLING, J.:—

There is a dispute in this case between the surviving executor of *John Pedley* and the *National Bank of Wales*, which must be decided in order that the amounts for which they are respectively to prove as creditors against the estate of the intestate may be ascertained; and, further, it has been agreed between them that I shall decide not only this question but all others which arise between them, including their respective rights to the title-deeds of the property. The order which I propose to make will contain a submission by both parties to be bound in like manner as if an action had been brought by one against the other, and the Defendant in such action had delivered a counter-claim.

[His Lordship then stated the facts of the case, and continued:—]

There is no evidence to shew when the mortgage-deed of the

(1) 14 Ves. 353: 17 Ves. 152, 169.
(2) 2 V. & B. 51.
(3) 7 D. M. & G. 399.
(4) 8th Ed. pp. 1827, 1828.
(5) Law Rep. 10 Ch. 22.
(6) 20 Ch. D. 611.
(7) 29 Ch. D. 725.

29th of September, 1879, was returned to *Ann Pedley*. It is stated by *Tunnicliffe* that about the end of 1884 he again pressed *Ingham* for payment of the £150 owing on the promissory notes, and it may be conjectured with some plausibility that the mortgage deed had been returned by that time, although the precise time at which it was returned is not very material.

The first question is whether *Thomas William Pedley* or the bank is entitled to priority. Now, the legal title to the property is vested in *Thomas William Pedley*, as surviving executor and devisee and legatee of mortgage estates of *John Pedley*; and he relies on his legal title, and contends that he has been guilty neither of fraud nor of any such negligence as would postpone him to a subsequent equitable mortgagee: *Evans* v. *Bicknell* (1); *Northern Counties of England Fire Insurance Company* v. *Whipp* (2). I think this contention is well founded. Fraud is not imputed to him; and there is no evidence of any negligence on his part. *Ann Pedley* was co-executrix and co-trustee with himself. She was also sole beneficiary during her life; and under these circumstances no blame can attach to him for leaving the deeds in her custody.

It is, however, contended on behalf of the bank, that *Ann Pedley* returned the deeds to *Ingham* for the express purpose of raising money on them; and that she could not set up the mortgage of 1879 against the bank which had lent money in reliance on the deeds: *Perry-Herrick* v. *Attwood* (3); *Briggs* v. *Jones* (4), and it is further said that as she was executrix of *John Pedley*, her acts bind his estate, and consequently *Thomas William Pedley*, in his capacity of beneficiary under the will.

An attempt was made to distinguish the present case from those of *Perry-Herrick* v. *Attwood* and *Briggs* v. *Jones*; but, though the facts differ somewhat, I am not satisfied that the principle of those cases would not apply so as to preclude *Ann Pedley* from setting up the mortgage of 1879, so far as she had beneficial interest in it, against the bank; but no authority was cited for the proposition that her acts bind *John Pedley's* estate so as to preclude other persons interested in that estate, or

(1) 6 Ves. 174.
(2) 26 Ch. D. 482.
(3) 2 De G. & J. 21.
(4) Law Rep. 10 Eq. 92.

STIRLING, J. 1892 *In re* INGHAM. JONES *v.* INGHAM.

Thomas William Pedley in particular, from relying on the legal title now vested in *Thomas William Pedley*.

No doubt one of several executors has at law large powers of binding the testator's estate by his acts: but it is not contended that anything was done by *Ann Pedley* to affect her title at law; all that is asked on behalf of the bank is that effect should be given to an equity in its favour. There are, no doubt, cases in which effect is given in Equity to rights arising from the act of a single executor. For example, I take it that the Court will, as a general rule, enforce an equitable security on part of the assets of a testator created by one of several executors in favour of a mortgagee for value, dealing in good faith: see *M'Leod* v. *Drummond* (1); but here the bank did not deal with *Ann Pedley*. There are, on the other hand, cases such as *Lepard* v. *Vernon* (2) and *Sneesby* v. *Thorne* (3), in which the Court has refused its assistance to persons seeking to enforce in Equity rights claimed by virtue of what has been done by a single executor contrary to the wishes of the co-executor. No case has been cited in which a Court of Equity has interfered against the legal title under circumstances similar to the present, except where the legal owner has been guilty of misconduct or has conferred an apparent authority to deal with the mortgaged property as if it were unincumbered. The equity to which effect was given in *Perry-Herrick* v. *Attwood* and *Briggs* v. *Jones* arose out of the personal acts of the legal mortgagee; and it seems to me that the authorities (all or nearly all of which are cited and commented on in *Northern Counties of England Fire Insurance Company* v. *Whipp* (4)) are adverse in principle to interference against the legal title, except where the owner himself, or some predecessor of his in title, has personally either been guilty of misconduct or conferred such apparent authority as I have mentioned. Mr. *Thomas William Pedley* has himself been guilty of no misconduct. He did not either in appearance or in fact authorize *Thomas Ingham* to deal with the property as unencumbered, and he does not derive his title from or through *Ann Pedley*—his title, whether as executor, trustee, or

(1) 14 Ves. 353; 17 Ves. 152, 169.
(2) 2 V. & B. 51.
(3) 7 D. M. & G. 399.
(4) 26 Ch. D. 482.

beneficiary, is co-ordinate with hers. I think, therefore, that he is entitled to priority over the bank.

The order will contain a declaration of such priority, and Mr. *Thomas William Pedley* will be admitted to prove against the estate for the amount of his debt, after deducting the value of his security. The bank will be admitted to prove against the estate for the full amount of its debt.

I am further to decide whether the bank is entitled as against *Thomas William Pedley* to retain possession of the deeds of 1872. Now it is laid down by *James*, L.J., in *Heath* v. *Crealock* (1) that a Court of Equity never takes away from a purchaser for value without notice anything which he has honestly acquired; and, if my jurisdiction were equitable merely, I could not deprive the bank of these deeds, on the faith of which its money was honestly lent to *Thomas Ingham*. But since the *Judicature Acts* this Court has had power to decide on legal as well as equitable claims, and *In re Cooper* (2) is a case in which a mortgagee was ordered to deliver up title-deeds at the instance of a legal owner.

Thomas William Pedley, as surviving executor of *John Pedley*, and as legal owner of the mortgaged property, possesses a title to the deeds to the assertion of which the bank, as it seems to me, has no answer at law. I must, therefore, make an order that the bank deliver up the deeds to *Thomas William Pedley*.

As regards the costs of these proceedings, both parties will be at liberty to add theirs to their respective debts; but there will be no other order.

Solicitors: *Wilkins, Blyth, Dutton, & Hartley*, agents for *C. S. Brooke, Nantwich; Saffery, Huntley & Son*, agents for *O. Lewis Edwards, Pwllheli; L. W. Byrne*, agent for *Lloyd Carter & Vincent, Carnarvon.*

(1) Law Rep. 10 Ch. 33. (2) 20 Ch. D. 611.

W. W. K.

STIRLING, J. BADCOCK *v.* CUMBERLAND GAP PARK COMPANY.

1892
Dec. 2.

[1892 B. 5357.]

Practice—Writ—Service on Foreign Corporation—English Shareholders—Register of Transfers kept in London—Service on Agent in London—Setting aside—Rules of the Supreme Court, 1883, *Order* IX., *r.* 8.

The Defendant company was incorporated according to the law of one of the *United States*, for the purpose of carrying on the business of hotel proprietors in *America*. The offices of the company were in *America*, and its business was managed by a board of directors resident there. Three-fourths of the capital of the company was held by English shareholders, for whose convenience the company employed an agent in *London*, who had offices there, and whose duties were to keep a record of dealings with the shares held by the English shareholders, to countersign certificates of shares, to receive payment of calls, and to remit the proceeds to *America*. The agent had business connections with other companies, whose names, together with that of the Defendant company, were written up on the door of his offices. Circulars and prospectuses relating to the company were issued by him, in which his offices were described as the *London* offices of the company. There was in his offices certain furniture belonging to the company, and money belonging to the company had been on one occasion lent by him for a period upon the *London Stock Exchange*.

In an action brought by a shareholder to restrain the company from carrying into effect certain resolutions for its reconstruction, the writ was served upon the *London* agent at his offices:—

Held, that the service must be set aside.

Motion.

This was a motion by the Defendant company to set aside the service of the writ and all subsequent proceedings in the action on the ground that neither the company nor any of its directors were domiciled or resident in *England*, and that no part of the business of the company was carried on there, and that the service had not been effected, in accordance with Order IX., rule 8, on the head officer, clerk, treasurer or secretary of the company.

The Plaintiff was a shareholder in the company, and in this action he claimed an injunction to restrain the company from carrying into effect a certain resolution passed by the shareholders for the reconstruction of the company.

The Defendant company was a foreign corporation formed under the general laws of the State of *Tennessee* in the *United States of America*, its business and objects being to develop certain lands in that State and to carry on the business of hotel proprietors at an hotel belonging to the company called "*The Four Seasons Hotel*" *and Sanatorium*, and situated at *Cumberland Gap*, in that State. The company had offices both at *New York* and *Cumberland Gap*, and its business was managed by a board of directors, all of whom were resident in *America*.

The company had an agent in *London*, Mr. *C. B. Holland*, who transacted certain business on its behalf at his own offices in the city of *London*, on the door of which he had placed the name of the Defendant company, amongst those of other companies with which he was connected. In Mr. *Holland's* offices there was certain furniture belonging to the Defendant company, but the offices were entirely his own. He received a fixed remuneration from the company, with an allowance for office expenses exclusive of disbursements. In an affidavit sworn by him he deposed, with reference to the extent of his authority as the company's agent, as follows:—

Par. 4: "On the formation of the Defendant company I was appointed by the directors to be the agent of the company in *England*, for the purpose of circulating information respecting the company and its prospects, and inasmuch as the shares of the company, both ordinary and deferred, were largely subscribed for in *England*, and are still held by persons resident there, I was further authorised, for the convenience of the English shareholders, to make entries in books, to be kept by me, of transfers of shares held by such shareholders. If and whenever any such shares are transferred, it is my duty to make an entry thereof in the books kept by me as aforesaid, and to forward a record of the said transfers to the head office of the company in *Tennessee*, and to hand over to the transferee share certificates duly signed in *America* by the president of the Defendant company."

Par. 5: "If and whenever a call is made by the directors of the company in *America*, I am further authorised by them to receive any moneys payable in respect of such call by the English shareholders, and to give a receipt for such moneys, such moneys

STIRLING, J. 1892 BADCOCK v. CUMBERLAND GAP PARK COMPANY.

(subject to a small deduction thereout for expenses) being thereupon remitted by me to *America*. I am not in any way concerned in carrying on the business of the Defendant company, and the scope of my agency for them does not extend beyond the purposes mentioned in paragraphs 4 and 5 hereof." In another affidavit he further said: "The *London* register of members is a branch register, and only applies to shareholders resident in this country and to transfers by them. Full particulars of all transfers of shares recorded by me on the said register are from time to time sent to the company's offices in *America*. All certificates of shares handed to transferees are signed by the president of the company in *America* and countersigned by me as the agent of the company in *London*. Transfers of shares not upon the *London* register have to be forwarded to *America* for registration and I have no authority with regard thereto."

He further deposed that all prospectuses and circulars which he had sent out from his office since the formation of the company had been drawn up and printed in *America* and sent over to him by the directors for distribution, but that a circular prepared and printed in *London* had been previously circulated by the promoters of the company, and in all such circulars his office was described as the *London* office of the company.

The company had a banking account at *Lloyd's Bank*, upon which the four members of the firm of solicitors, who acted as the *London* solicitors of the company, were empowered to draw cheques, which, however, were countersigned by the agent.

Of the shareholders of the company, about three-fourths were resident in *England*, and all calls payable upon their shares were received by Mr. *Holland*.

It was alleged, by the Plaintiff, that the company transacted business on the *London Stock Exchange*, and there was evidence that at one time the company had a sum of £40,000 on loan upon *Stock Exchange* securities; but this appeared to have been an isolated transaction, and when the loan was paid off the money was remitted to *America*.

It was further alleged that rooms in the company's hotel could be engaged at the *London* office, but in his Lordship's opinion there was no evidence to support this allegation.

The writ in this action was served upon Mr. *Holland* on the 18th of November, 1892. No appearance was entered by the company, and they now moved to set aside the service of the writ on the grounds above stated.

Buckley, Q.C., and *Carson*, for the motion:—

The service of the writ ought to be set aside on two grounds. First, we say, the company is an American company, and does not carry on its business in *England*. The principal business of the company is to carry on an hotel in *America*. The company has no office in this country. Mr. *Holland* is, no doubt, the agent of the company, but his office is not the office of the company. His duties are limited to giving information respecting the company, and to recording transfers of shares held in *England* and remitting moneys received for calls to the company in *America*. No doubt a company may be resident here, although its principal place of business may be in a foreign country; but here there is no evidence to support such a contention. A portion of the capital is held in this country, and that accounts for all that has been established in this case. There has been no real and substantial carrying on of business in this country: *Haggin* v. *Comptoir D'Escompte de Paris* (1).

Further, we say that Mr. *Holland* was not the "head officer, clerk, treasurer, or secretary of the company," within Order IX., rule 8: *Newby* v. *Von Oppen* (2); *Mackereth* v. *Glasgow and South Western Railway Company* (3); *Nutter* v. *Messageries Maritimes de France* (4).

Hastings, Q.C., and *Swinfen Eady*, for *Badcock*:—

The company carry on an important part of their business in this country. The evidence shews that they invest money here and deal with their shares. Mr. *Holland's* office is held out as the *London* office of the company, and he is practically in the position of a managing director. The work done by him constitutes a principal part of the business of the company within the authority of *Haggin* v. *Comptoir D'Escompte de Paris*. He

(1) 23 Q. B. D. 519, 521.
(2) Law Rep. 7 Q. B. 293, 295.
(3) Law. Rep. 8 Ex. 149.
(4) 54 L. J. (Q.B.) 527.

STIRLING, J. is the only officer of the company here, and must therefore come within Order IX., rule 8.

[They also referred to *Russell* v. *Cambefort* (1).]

1892

BADCOCK v. CUMBERLAND GAP PARK COMPANY.

STIRLING, J.:—

This is a motion to set aside the service of a writ on a foreign corporation. The service has been effected under rule 8 of Order IX., which provides that "In the absence of any statutory provision regulating service of process, every writ of summons issued against a corporation aggregate may be served on the mayor or other head officer, or on the town clerk, clerk, treasurer, or secretary of such corporation." There is no statutory provision which regulates service on this company, which is a company incorporated according to the law of the State of *Tennessee* in the *United States* of *America*. Now the writ is one which is somewhat startling to find issued in this country at all. It is an action by a shareholder in the company, against the company, asking for "an injunction to restrain the Defendant company from acting upon or carrying into effect any resolution of the shareholders of the company for the reconstruction of the company in accordance with the scheme contained in the report dated the 15th of October, 1892, on the ground that the same is *ultrà vires* the Defendant company, and for damages, and further and other relief." So that the object of the action is to determine whether a resolution of shareholders of this American company is or is not within the powers of the company. I say it is rather surprising to find such an action brought in an English Court; but if the law of this country compels me to try such an action, no doubt it is my duty to obey that law.

The question here arises whether the rules of the Court with respect to service have been complied with. Now, I have already read the rule, and the first question which I have to consider is whether the rule applies to a company such as this. It has been settled by the authority of the Court of Appeal that the rule which I have read is not confined to English corporations, but does extend to foreign corporations. The latest case upon this point, which has been cited to me is that of *Haggin* v.

(1) 23 Q. B. D. 526, 528.

Comptoir D'Escompte de Paris (1), and I shall read a few passages from the judgment of Lord Justice *Cotton* which seem to me to sum up the effect of all the previous decisions. He says: "The first objection made is that this rule does not apply to foreign corporations at all. The doubt arises from the ambiguity of the expression 'foreign corporation.' If it means a corporation established abroad by foreign law, I do not agree with the objection; if it means a corporation which is not carrying on business and has no residence in *England*, I agree with it. Why should not the rule apply to a corporation established by foreign law which has a residence in *England*? I agree that the exception would not apply to foreign corporations, but that does not shew that the rest of the rule applies only to English corporations. It was said, and no doubt it is true, that 'corporation aggregate' is a term of English law, but if we find a foreign corporation which comes within the description, I think the mere use of a technical expression as a term of art will not prevent such a corporation from coming within the rule. I see nothing in the rule which shews that it is not applicable to foreign corporations; and in my opinion it would be wrong to say that the rule does not apply to foreign corporations, that is, corporations established by foreign law, which are carrying on business, and therefore are resident, in *England*, and are submitting themselves to the laws of this country. The question, therefore, comes to this. Is this corporation resident in this country?" And then he says, "I think it is. The principal part of its business is carried on at the office in *London*, and I think that when a foreign corporation, established by foreign law, sets up an office in *England* and carries on one of the principal parts of its business here, it ought to be considered as resident in *England*, and be treated as if it were established by English law." Therefore the result of that passage is this: that if a foreign corporation established by foreign law sets up an office in *England* and carries on one of the principal parts of its business here, it is to be considered as resident here. It may illustrate the meaning of that passage if one refers to the facts of that particular case. The defendant company, in that case,

(1) 23 Q. B. D. 521.

STIRLING, J. 1892 BADCOCK v. CUMBERLAND GAP PARK COMPANY.

was a foreign corporation incorporated by French statutes and carrying on business in *France*, but having a branch office in *London*. The corporation carried on banking, discount, and other financial operations in *France* and other countries. The manager of the branch bank in *London* held a power of attorney from the corporation which authorized him to manage and direct the agency of the corporation in *London* and discount and purchase drafts upon *Europe* and other specified places, and to transact other business connected with banking and discount operations, and to do various other acts.

Now, I have to ask myself: Is it established in this case that the company which is the Defendant to this action carries on a principal part of its business here in *London*? What is the business of this company? It is called the *Cumberland Gap Park Company*, and the main business and object of the company is to carry on the business of an hotel in the State of *Tennessee* in *America*. It has unquestionably an agent in *London*, namely, Mr. *Charles Barclay Holland*. Mr. *Holland* has an office in the city of *London*, and he has put up the name of the company upon that office; and, more than that, that office of his is described in various circulars which have been put in evidence as "the *London* office of the company." It is sworn by Mr. *Holland*, and I see no reason to doubt his statement, that the office does not belong to the company but belongs to himself. It is in evidence, however, that some of the office furniture at least is the property of the company. Now, upon that, I make this remark, that it is not enough that the company, a foreign company, should possess property in this country. That is quite clear. You must prove far more than that. You must prove that it is carrying on business in such a way as to be resident in this country. Well, what are the acts which are relied upon as shewing that the company carries on business in this country? First of all, it is said that it has lent money on the *London Stock Exchange*. Now that is not a principal part of the business of the company so far as it is disclosed by these affidavits. The business of hotel keeping is the principal business of the company. And what has happened is this: the hotel company having at some particular period some moneys in their hands which they did not immediately require

for the purpose of their business, lent them on the *London Stock Exchange*, and the money so lent was very considerable in amount at one time. But it is sworn by Mr. *Holland* that that was only one loan, though it was continued in the ordinary way in which *Stock Exchange* transactions are carried on; that is to say, from fortnight to fortnight—as it is called "on the account"; and it seems to me to amount to no more than this, that the company at one period did possess property in this country. That really carries the matter no further than it was before. Then it is alleged that the company in this country made contracts with reference to their business in *America*. It is said that upon application at the *London* office you can secure rooms in the hotel at this place in the State of *Tennessee*. It seems to me that when the evidence upon that point is looked at it completely breaks down. If it is sworn to by the Plaintiff on the one hand, it is denied by the Defendants and Mr. *Holland* on the other. But that does not stand alone. We have corroborative evidence. The Plaintiff appears to have telegraphed to *New York* to know whether he could secure rooms at the *London* office, and the answer was "Yes." But it appears from the evidence of Mr. *Holland* that, at the same time, the following special telegram was sent to him: "If the gentleman in whose name the telegram has been sent comes to you he can have them." That is how the matter stands.

And now we come to what is perhaps a more serious matter. The company's capital is divided into shares, and a number of the shareholders are resident in *England*, and it appears that there are kept at the office in *London* certain books relating to those shares, which books are under the control of Mr. *Holland*. Now, what Mr. *Holland* says is this [His Lordship then referred to the evidence of Mr. *Holland* on this point, and continued:—] According to that evidence, therefore, the dealings of the company in this country are limited.

Is the company, then, carrying on its business here, so as to bring it within the rule laid down by Lord Justice *Cotton* in the case to which I have referred? In my opinion it is not. The evidence merely comes to this: that the company for the convenience of its English shareholders has an office in *London*, at which

STIRLING, J. 1892 BADCOCK v. CUMBERLAND GAP PARK COMPANY.

their dealings with the shares in *England* are recorded. I do not think that the Lord Justice had a case of this kind in contemplation when he laid down the law in his judgment in the case referred to.

It does not seem to me, therefore, that this case is brought within the rule, and I think the motion ought to succeed, and that the service should be set aside.

Solicitors for the Company: *Paine, Son, & Pollock.*
Solicitor for the Plaintiff: *Arthur Harris.*

G. A. S.

In re NEW YORK EXCHANGE COMPANY.

KEKEWICH, J.

1892

Nov. 17.

Company—Winding-up—Costs—Priority—Voluntary Winding-up—Supervision Order—Costs of Liquidator and Petitioning Creditor—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *ss.* 110, 144 [*Revised Ed. Statutes, vol. xiv., pp.* 226, 234].

Where, on the petition of a creditor, an order is made continuing the voluntary winding-up of a company under the supervision of the Court, the costs of the liquidator incurred previously to the order are payable in priority to the petitioner's costs of obtaining the order; but those costs are payable in priority to the costs of the liquidator incurred subsequently to the order.

Adjourned summons.

On the 3rd of May, 1888, the usual order was made on the petition of a creditor continuing the existing voluntary winding-up of the *New York Exchange Company, Limited*, under the supervision of the Court.

The liquidator appointed in the voluntary winding-up continued to act as liquidator after the supervision order, and by his final account it appeared that a balance of £41 13*s.* was due from him. The costs of the Petitioner in obtaining the supervision order exceeded the sum last mentioned, and an order was made directing the liquidator to pay the £41 13*s.* to the Petitioner.

The liquidator died without complying with the order, and his legal personal representative was made a party to the winding-up proceedings.

The balance in question was part of a sum of £50 which was in the hands of the solicitor to the liquidator and had been received by him with full notice of all the circumstances.

There were due to the solicitor for costs two sums of £14 10*s.* and £20 7*s.*, the former sum being the costs of the liquidator of an action brought by the company against an alleged debtor to them, but which action was, previously to the supervision order, discontinued by the liquidator in the interests of the creditors and contributories. The other sum was in respect of general costs of the liquidator incurred in the winding-up subsequently

KEKEWICH, J.

1892

In re NEW YORK EXCHANGE COMPANY.

to the 16th of November, 1888. These costs had been disallowed by the Chief Clerk, and the present summons was taken out by the representative of the deceased liquidator asking that the solicitor might be ordered to pay over the £41 13*s.* to the Applicant to enable him to comply with the order against the deceased liquidator. The petitioning creditor was made a Respondent to the summons.

His Lordship held that the application was irregular, but by consent of the parties the matter was dealt with by the Court as though upon an application to determine the rights of all parties in respect to a fund in Court.

Whinney, for the Applicant, the representative of the deceased liquidator.

Warmington, Q.C., and *Dauney*, for the solicitor to the deceased liquidator:—

Costs properly incurred by the liquidator in the voluntary winding-up of a company are payable out of the assets in priority to all other payments, and as between one set of costs and another those first incurred must be first paid. Sect. 144 of the *Companies Act*, 1862, provides that "all costs, charges, and expenses properly incurred in the voluntary winding-up of a company, including the remuneration of the liquidators, shall be payable out of the assets of the company in priority to all other claims." No doubt the effect of the supervision order was to make the costs of the Petitioner costs properly incurred in the winding-up; but the liquidator's right to his costs, or, at all events, to any costs previously incurred, could not thereby be displaced.

Douglas, for the petitioning creditor:—

The costs of the petitioning creditor are payable in priority. The rule is clearly established that where the assets are deficient for payment of costs, the costs of the petition to wind up have priority over the other costs, even over those of the liquidator: *Lindley* on Companies (1); *Buckley* on Companies (2); *In re*

(1) 5th Ed. p. 865. (2) 6th Ed. p. 296.

Audley Hall Cotton Spinning Company (1); *In re Freehold Land and Brickmaking Company* (2). Such costs ought to be paid by the liquidator out of the first funds which come into his hands after the date of the order. The supervision order when made enures for the benefit of all parties, and the creditor by whom it has been obtained for the benefit of all is entitled to priority in respect of his costs.

Warmington, in reply:—

The authorities cited have reference only to sect. 110, and not to sect. 144, by which this case is regulated. In a voluntary winding-up the Court is not, as under sect. 110, asked to make an order as to costs "as it thinks just," but the rule is prescribed by sect. 144. The supervision order makes no difference; it merely follows the terms of the Act. It directs that the costs of the Petitioner are to be taxed and paid out of the assets of the company; but "assets" means merely the money which the company has after paying the costs of winding up down to that date.

KEKEWICH, J. (after stating the facts of the case, continued as follows):—

I have no hesitation in saying that the liquidator's costs, both the £14 10*s.* costs of the action, and the £20 7*s.* general costs, from the 16th of November, 1882, are costs which the liquidator ought to be allowed out of the assets. But then the question arises whether they are payable in priority to the costs of the petitioning creditor. That question raises two points, both of which appear to be novel, for I have not been referred to any case which has arisen on the one or the other. For a statement of the general law I have been referred to the following passage from *Lindley* on Companies (3): "Where the assets are deficient, even for the payment of costs, the costs of the petition to wind up are entitled to priority over the other costs, and even over those of the liquidator." The learned writer refers to one or two cases, the two of them which are best known being both before Lord *Romilly*. One is *In re Audley Hall Cotton Spinning*

(1) Law Rep. 6 Eq. 245. (2) Law Rep. 9 Eq. 367, 369. (3) 5th Ed. p. 865.

KEKEWICH, J.

1892

In re NEW YORK EXCHANGE COMPANY.

Company (1), where the main question more fully considered was how far and in what order successive solicitors ought to be paid, and the decision of *Cormack* v. *Beisly* (2), which I had occasion to look into not long ago, was under discussion; and I observe that Lord *Romilly* disposes of the petitioner's costs at once in a very few words, "the petitioner's costs are the first charge"; and then he goes on to other matters, and reserves judgment, and gives his judgment on another day. Then the same point was again before the same Judge in the case of *In re Freehold Land and Brickmaking Company* (3), and there he lays down the rule perfectly clearly: "The rule of the Court is this, that in the first place the costs of the petition for winding up are to be paid out of the assets, next the costs of the winding-up, and then the remuneration of the official liquidator; but no remuneration can be given until all the costs of the winding-up are paid, including the costs of any provisional liquidator who may have been properly appointed." Now, that rule depends on sect. 110 of the Act of 1862, which provides that "the Court may, in the event of the assets being insufficient to satisfy the liabilities, make an order as to the payment out of the estate of the company of the costs, charges, and expenses incurred in winding up any company in such order of priority as the Court thinks just." And the Court, in deciding as to the equitable order of priority, has thought it just to make a rule of the kind I have mentioned. It is argued on behalf of the solicitor to the deceased liquidator, that that rule has no real bearing on a question arising in the voluntary winding up of a company. In order to decide that, I must ask myself why the Court has arrived at that conclusion. Why has the rule been established? It seems to me that the reason is that which has been stated by Mr. *Douglas*. A petitioning creditor is supposed to commence his proceedings on behalf of all the creditors, to insist upon and obtain a winding-up order for their benefit, and therefore, as the representative of a class, it is only right that he should be paid in priority, and in full, the costs which he incurs in doing that which is for the benefit of all. That, as I understand it, is the

(1) Law Rep. 6 Eq. 245. (2) 3 De G. & J. 157. (3) Law Rep. 9 Eq. 367, 369.

principle. I was about to say that it is the same sort of principle as applies to costs of administration actions, where the assets are deficient; but no Judge has ever yet ventured to say that the rule adopted in reference to such costs rests on any intelligible principle, and, therefore, I only refer to it as somewhat analogous. Does the rule apply to a voluntary winding-up where we have a different section altogether, viz., sect. 144? [His Lordship read the section, and continued:—] I have not been referred to any similar section touching a voluntary winding-up under a supervision order. General principle would lead me to regard a supervision order as for this purpose an order for winding up the company by the Court. Whether that can be pressed to its literal results or not, my own opinion is that a creditor coming for a supervision order, or coming for a compulsory order and being obliged to accept a supervision order (which is the same thing), must be supposed to be suing on behalf of himself and all other creditors in the same way, whether there is a voluntary winding-up on foot or not. If there is a voluntary winding-up, he has to prove that the creditors are injured by it, that it is necessary for their protection that there should be a compulsory or a supervision order; he cannot get such an order without that, and the result is that he really is in the same position as a petitioning creditor coming in the first instance. He is credited with the same good intentions, and his action has the same beneficial result; and, therefore, it seems to me as regards costs incurred in obtaining the order, and costs incurred subsequently in the winding-up, now conducted under the supervision of the Court, the petitioning creditor must have the same priority as he would have under a winding-up order by the Court.

But that reasoning does not apply to costs of the liquidator previously incurred. The liquidator, whether he happens to be a stranger to the company, or the secretary, or a director, is the agent of the company only, and is not acting then for the creditors, but for the contributories. The company is still a going concern, though in the process of winding up, and to say that the costs incurred during that time are to be postponed to the costs of a petitioning creditor who may come in six, twelve, or

KEKEWICH, J.
1892
In re NEW YORK EXCHANGE COMPANY.

many more months afterwards, would seem to me at the same time to give the petitioning creditor more than he is fairly entitled to on the ground which I have mentioned, and, on the other hand, to be extremely hard on those officers of the company, liquidators, solicitors, or others, who act in good faith during the interval. It would be difficult for a solicitor to know how he could properly advise his clients during a voluntary winding-up if the possibility of another order were hanging over his head, and he were not able to look forward to being paid out of the assets for the work done by him. It seems to me that here the former reasoning fails, and, not only so, but all good reason points to these costs not being postponed to the costs of the petitioning creditor. The result of that is that the costs properly incurred, whatever they are, by the liquidator, before the 3rd of May, 1888, ought to be paid out of the assets, which, though not realized before, were part of the assets of the company at the date of the order, and to some extent in the solicitor's hands. The costs incurred after that date must be postponed to those of the petitioning creditor. What is to be got out of it I do not know; but I do not know that the solicitor has exhausted his claim. I do not invite him to make any further claim; but as the question has been raised here, and solemnly argued whether he is entitled to charge this £20 7*s.*, I must give him an opportunity of proving for any more costs if any have not been brought in. All I can do is to direct an inquiry what, if anything, is due to him in respect of his bill of costs as between him and the liquidator, if shewn to be properly incurred before the 3rd of May, 1888, and I will declare that what shall be ascertained to be due from the liquidator will be properly retained by the solicitor out of the £50 appearing to have been paid to him by the liquidator. Beyond that I cannot at present go. I am afraid I must reserve the costs with power to make an order on the solicitor to pay the difference. I must leave it there. I hope the good sense of the parties will prevent the necessity of my having to discuss it further, because it is quite obvious no good can come from it to any one.

Solicitors: *Lyne & Holman; Hancock, Marrable, & Terrell J. A. Neale.*

C. C. M. D.

BRADBURY *v.* WILD.

[1892 B. 17.]

KEKEWICH, J.

1892

Nov. 26; *Dec.* 3.

Building Society—Advanced Member—Mortgage—Proviso for Redemption—Alteration of Rules after Date of Mortgage—Contract of Mortgage and Contract of Membership—Building Societies Act (6 & 7 *Will.* 4, *c.* 32).

An advanced member of a building society executed a mortgage to the society, with a proviso for redemption on payment of "the several sums, whether consisting of monthly subscriptions, fines, interest, or other payments which, under the constitution of the said society and the rules and regulations thereof," ought to be paid in respect of his shares, and a covenant for payment to the same effect. At the time of the mortgage the rules of the society did not provide for any contribution by advanced members to losses of the society, but subsequently thereto the rules were duly altered by empowering the directors to make a levy on members of a contribution to losses; and under the rules so altered a levy was made. The mortgagor claimed to be entitled to redeem without paying any part of such levy:—

Held, that although the mortgage did not refer to the rules "for the time being," yet the mortgagor, by virtue of his contract, which was one of mortgage and membership combined, was bound by the altered rules, and was therefore not entitled to redeem except upon payment of his proportion of the levy.

Wilson v. *Miles Platting Building Society* (1), and *Rosenberg* v. *Northumberland Building Society* (2), considered and applied.

Adjourned summons.

The *Clarendon Arms Benefit Building Society* (of which the Defendants were the present trustees) was established in the year 1871, and was not incorporated under the *Building Societies Act*, 1874.

Among the rules of the society, which were certified under 6 & 7 Will. 4, c. 32, were the following:—

"Rule 51 (Withdrawals.) Any member who has not received any advance on his or her share or shares may, upon giving one lunar month's previous notice in writing to the secretary, within the first year from the date of his or her subscribing for such share or shares to be withdrawn, receive back the net money by him or her subscribed, without interest; and after the

(1) 22 Q. B. D. 381, n. (2) 22 Q. B. D. 373.

KEKEWICH, J. 1892 BRADBURY v. WILD.

expiration of the first year of any such member, upon giving notice as aforesaid, shall be entitled to withdraw his or her share or shares, with interest thereon, after the rate of five pounds per annum, compound interest, commencing from the end of the first year of his or her subscribing for such share or shares as aforesaid, less one-twentieth part of such interest, and the sum of one shilling for each share. Half and quarter shares in proportion. The directors shall have full power, from time to time, to limit the number of shares to be withdrawn in any one month. All applications for advances shall have priority over notices of withdrawals; and if more than one member give notice, they shall be entitled to be paid in rotation, according to priority of notice. No member shall be entitled to receive back his or her subscription money and interest until all fines and forfeitures due from such member at the time he or she shall give notice to withdraw be paid, and if not paid shall be deducted from such member's money and interest. All fines to cease after notice given as aforesaid.

"52. (Power to redeem.) If any member, who shall have executed a mortgage to the society, shall be desirous of paying off and redeeming the same, such member may do so after the expiration of fourteen days from the service upon the secretary of a notice in writing, signed by such member, of his or her intention so to do, by paying to the treasurer, in one sum, the whole of the moneys that may be due from him or her to the said society, subject to the same terms as contained or mentioned in rule 51.

"61. (New rules.) The society shall have, from time to time, the power of making new rules, and of amending any of the rules, so as such new rules or amendments be made in accordance with 10 Geo. 4, c. 56, s. 9, and duly certified."

The Plaintiff became a member of the society in June, 1876, and on the 4th of September, 1876, had an advance of £120 from the society in respect of two shares, and executed to the existing trustees of the society a mortgage, bearing date on that day, of certain freehold property belonging to the Plaintiff as security for the sum so advanced, and further advances not exceeding £2500. The mortgage deed contained a proviso for redemption,

if the mortgagor should, "from time to time duly pay the yearly rent to which the premises are liable, and also the several sums, whether consisting of monthly subscriptions, fines, interest, or other payments, which, under the constitution of the said society, and the rules and regulations thereof, ought to be . . . paid in respect of the share or shares, by virtue of which money is now or shall be hereafter advanced to him by the trustees of the said society," and a covenant by the mortgagor that he would "duly pay and perform the rent and covenants aforesaid, and also will duly pay the several sums which, under the constitution of the said society and the rules and regulations thereof, and the provisions herein contained, ought to be paid by him or them."

Further advances were, from time to time, made to the Plaintiff, amounting, in all, to £2490, in respect of 41½ shares.

Subsequently to the execution of the mortgage the rules of the society were altered, and the alterations so made were duly certified by the Registrar on the 26th of October, 1883. Rules 51 and 52 were altered as follows:—"(Rule 51.) Omit the words 'compound interest.' Rescind the portion commencing with the words, 'And if more than one member give notice,' and ending with the words, 'All fines to cease after notice given as aforesaid,' and substitute the following:—'Before any withdrawals can be made, if it shall appear that the profits of the society shall, from any cause, not be sufficient to meet the interest credited, or to be credited to the shareholders as aforesaid, or if a loss shall have arisen, or be likely to arise, through any property or properties which the society holds as mortgagees, which the contingent fund is insufficient to make good, the directors shall have power to direct a levy of such sum, on, or from any unadvanced share or shares, hereafter to be paid in advance, as will cover all deficiency. Withdrawals shall be paid in rotation, according to priority of notice, except in the case of the decease of a member, when payment shall be made as soon as possible after expiration of the notice of withdrawal, provided all shares or loans, in respect of which notice for any advance or repayment has been received by the society, shall have been advanced or paid off. Shares in course of withdrawal shall be subject to

KEKEWICH, J. 1892 BRADBURY v. WILD.

such deductions as the directors may require to meet any losses of the society.' Rule 52. Add to the end of rule 52 the words 'as amended.'"

On the 9th of January, 1885, the directors of the society resolved "that a levy of 1*s.* 1½*d.* in the pound sterling be made on all shares at present in the society withdrawn or expiring."

On the 9th of December, 1889, the Plaintiff duly gave notice of his intention to pay off his mortgage, and the notice expired on the 22nd of December, 1889. The society furnished an account to the Plaintiff shewing a balance due from him of £293 8*s.* 2*d.*, crediting him (*inter alia*) with £450 4*s.* 11*d.* for profits due to him, and debiting him with a sum of £58 15*s.* 2*d.*, as the proportion due from him in respect of his shares under the levy of January, 1885, and with certain other and smaller sums which, he contended, he was not liable to pay.

The Plaintiff then tendered to the society, in respect of the balance due from him, a sum of money which was insufficient if the £58 15*s.* 2*d.* was payable by him, and the society declined to accept such tender.

This was an originating summons by the Plaintiff, asking for an order for redemption of the premises comprised in the mortgage, and reconveyance thereof to the Plaintiff, and for usual accounts and inquiries, having regard to the tender, and that directions might be given that the Defendants were not entitled to debit the Plaintiff with the levy of £58 15*s.* 2*d.*

Renshaw, Q.C., and *Roby*, for the Plaintiff:—

First: The altered rules being subsequent to the Plaintiff's mortgage, are not binding on him as mortgagor: see *In re Norwich and Norfolk Provident Permanent Benefit Building Society* (1), where, notwithstanding that the mortgages referred to the rules of the society "for the time being," the advanced members were held entitled to redeem on the footing of the rules in force at the date of their respective contracts. There the new rules were to apply to all the members, past as well as future, so far as the rules of Law and Equity would permit, and it was held that those members whose contracts would be sub-

(1) 1 Ch. D. 481.

stantially varied by the new rules were excluded from their operation. In *Wilson* v. *Miles Platting Building Society* (1) and *Rosenberg* v. *Northumberland Building Society* (2), the Court of Appeal held that the advanced members were bound by the altered rules; but that was because the mortgages contained a reference to the rules "for the time being," and the Court in both cases relied on that circumstance. Here there are no such words; but the reference is simply to sums which ought to be paid "under the constitution of the said society, and the rules and regulations thereof"—*i.e.*, the rules and regulations in force at the date of the mortgage contract. The constitution of the society is the same thing as the rules and regulations. Under 6 & 7 Will. 4, c. 32, by the mere constitution of a building society, nothing becomes payable independently of the rules and regulations. The new rules being out of the way, the Plaintiff, as an advanced member, is not liable to contribute to losses of the society: *Tosh* v. *North British Building Society* (3); *Brownlie* v. *Russell* (4); *Buckle* v. *Lordonny* (5); *Bailes* v. *Sunderland Equitable Industrial Society* (6).

Secondly: Assuming that the new rules are binding on the Plaintiff, his case is not within them. Rule 51, as altered, authorizes a levy only on "any unadvanced share or shares, hereafter to be paid in advance"; and before the new rules came into force he had been advanced as to all his shares. The resolution of the 9th of January, 1885, was *ultrà vires* so far as it went beyond the terms of rule 51 as altered; and, moreover, it extends only to shares "withdrawn or expiring," and the Plaintiff's shares are neither the one nor the other.

Thirdly: In point of fact, there never has been a loss of the kind indicated in rule 51 as altered—*i.e.*, a loss "arisen," or "likely to arise, through any property or properties which the society holds as mortgagees." There is nothing to shew that it was anticipated in 1885 that there would be such a loss. On the contrary, the balance-sheets of the society shewed a profit. It was, therefore, not in the power of the directors to make the levy.

(1) 22 Q. B. D. 381, n.
(2) Ibid. 373.
(3) 11 App. Cas. 489.
(4) 8 App. Cas. 235.
(5) 56 L. J. (Ch.) 437.
(6) 55 L. T. (N.S.) 808.

KEKEWICH, J.

1892

BRADBURY v. WILD.

Hopkinson, Q.C., and *O. L. Clare*, for the Defendants:—

The contract of the Plaintiff with the society was not merely one of mortgage; it was also a contract of membership, and as such, according to the language of Lord Justice *Fry*, in *Rosenberg* v. *Northumberland Building Society* (1), carried *in gremio* the right of the society to alter the rules from time to time. The normal contract between an advanced member and the society is that he shall pay a series of instalments in due course, and if he wishes to discontinue such payment before the contract arrives at maturity, he can only do so under some rule permitting him to withdraw: *Wurtzburg* on Building Societies (2). This view of the relation between the parties is recognised by sect. 1 of 6 & 7 Will. 4, c. 32, which refers to the rules "then in force"—*i.e.*, at the time of withdrawal. At the time when the Plaintiff withdrew, or gave notice to redeem, which, by rule 52, is placed on the same footing as withdrawal, rule 51 as altered was the rule in force. *In re Norwich and Norfolk Provident Permanent Benefit Building Society* (3) is distinguishable, because, as pointed out by Lord Justice *Cotton* in *Wilson* v. *Miles Platting Building Society* (4), it turned on the wording of a peculiar rule. It is true that both in *Wilson* v. *Miles Platting Building Society* and *Rosenberg* v. *Northumberland Building Society* the words "for the time being" occurred; but the judgments of Lord Justice *Cotton* in the former, and Lord Justice *Fry* in the latter case, shew plainly that they would have come to the same conclusion if those words had not been there.

The Plaintiff being in the position of a withdrawing member, rule 51, as altered, is clearly applicable to him; for it provides that "shares in course of withdrawal shall be subject to such deductions as the directors may require to meet any losses." Moreover, the words "hereafter to be paid in advance" in that rule ought to be construed as referring to payment in advance of maturity; so read, the rule is intelligible and in conformity with the Act of Parliament.

The loss arises from the deficiency of the company's securities within the meaning of rule 51. It does not appear by the

(1) 22 Q. B. D. 373.
(2) 2nd Ed. p. 318.
(3) 1 Ch. D. 481.
(4) 22 Q. B. D. 381, n.

balance-sheet, because it is impossible for the directors to write off the anticipated loss, and according to the way in which the accounts of these societies are kept, the full amounts owing on mortgages are necessarily shewn on one side of the account, and the assets may then appear to be in excess of liabilities, although it is known to all that there must in fact be a loss. The Plaintiff has received his share of profits calculated on this basis, and it is only fair that he should also bear his share of the estimated loss.

[They referred also to *Walton* v. *Edge* (1), and *In re West Riding of Yorkshire Permanent Benefit Building Society* (2).]

Roby, in reply:—

The words "shares in course of withdrawal," in rule 51, refer to shares which were in course of withdrawal at the time when those rules were passed, and therefore do not apply to the Plaintiff. The suggested construction of the words "hereafter to be paid in advance" is inadmissible, for it in effect gives two totally different meanings to the word "advance" occurring in the same clause. The altered rule 51 only extends to members who were unadvanced at the time when that rule was passed, and therefore does not affect the Plaintiff. To make advanced members bear losses, the rules must be specific and clear: *Durham and Northumberland Building Society* v. *Davidson* (3); *In re Britannia Building Society* (4).

KEKEWICH, J.:—

The question to be decided in this case arises on a mortgage contract of one *Samuel Bradbury*, who, having some property, was minded to obtain an advance, and who therefore applied to the *Clarendon Arms Building Society*, part of whose business it is to advance money on property of that kind. Without going fully into the matter, that which is within the experience of all men in or outside the Court familiar with such societies took place. The society commenced negotiations by saying, or at all events it was necessarily implied in the commencement of the negotiations, that the borrower should become a member of the

(1) 10 App. Cas. 33.
(2) 43 Ch. D. 407.
(3) 8 Times L. R. 428.
(4) 65 L. T. (N.S.) 196.

KEKEWICH, J. 1892 BRADBURY v. WILD.

society, and that having become a member he should then be an advanced member; in other words, that no advance would be made to him except on his taking certain shares in the society, in respect of which, on giving proper security, he would be entitled to certain advantages; and the mortgage deed is framed on that footing, in a form which is concise and consistent, having regard to our knowledge of such transactions. The mortgage does not recite that he is a member; he is not described in the recitals in any way as a member. The deed commences as though it were a mere contract between a mortgagor and mortgagees, and as though it had nothing to do with the society at all, except that the mortgagees are described as the trustees of the building society; but when the mere conveyance to the mortgagees is passed, and we come to those provisoes which declare what the equity of redemption is, then it is at once seen how the membership comes in. There is a proviso for redemption on his paying the yearly rent, "and also the several sums, whether consisting of monthly subscriptions, fines, interest, or other payments which, under the constitution of the said society, and the rules and regulations thereof, ought to be paid in respect of the share or shares by virtue of which money is now or shall be hereafter advanced to him by the trustees of the said society." Those are the terms of redemption, and in the covenants which follow there is one by the mortgagor "that he will pay the several sums which under the constitution of the said society and the rules and regulations thereof, and the provisions herein contained ought to be paid by him or them." So that we have clearly a contract of a very common, and yet of a special character—that is to say, it is not an ordinary mortgage contract. It is not an ordinary contract of a member with a building society, but it is an amalgamation of these two—a contract by a member of a building society who is to receive an advance in respect of his membership and of his conveyance to the society of his property. I confess that, independently of any authorities, I should have expected to find that the rules referred to meant those which bind him as a member, and that if there were, as in fact there is, a power on behalf of the society, subject to certain restrictions, to vary these rules

from time to time, the varied rules would still be binding on him for the purposes of this contract, because it is an essential term of it that he enters into it as a member of the society, and of that opinion was Lord Justice *Cotton* in the *Miles Platting Case*. He says (1): "One would expect, therefore, if the new rules were properly made, having regard to the laws regulating the society and to the original rules, that those new rules would regulate his position in regard to the security, it being, as was rightly contended for the appellant, not an ordinary mortgage to secure the payment in terms of a definite sum of money due and payable by the mortgagor to the society, but to secure the due payment by him of the periodical payments and fines, and any other moneys which he was bound to pay as a member of the society." That passage seems to me to indicate what would be the proper limit of the obligation of the new rules. New rules which alter the contract would not be binding on him. New rules inconsistent with the constitution of the society of which he was a member would not or might not be binding on him; but rules which are concerned with the periodical payments of fines or any other sums are rules which, so far from altering or being inconsistent with the contract, seem to me to be according to the contract. There again I have the authority of Lord Justice *Cotton* in the same case (2): "It is true that those rules may throw a heavier burden on the plaintiff, by requiring him to pay a larger sum for the redemption of the mortgage than the old rules did, but that is not an alteration of his contract. His contract, as I read it, was that he would pay not merely what the then existing rules required, it is not confined to that, but whatever the rules of the society for the time being might require him to pay as a member. To say that the new rules do not apply would, in my opinion, be to alter the contract." I will return to that case directly. I have only read these passages of Lord Justice *Cotton's* judgment to shew that his view was, as mine certainly is, that you would expect in such a contract that the obligation of the new rules properly made would be thrown on the members, provided, of course, that the rules were fairly within what might be in the contemplation of the

(1) 22 Q. B. D. 382. (2) 22 Q. B. D. 383.

KEKEWICH, J.

1892

BRADBURY v. WILD.

parties, and, therefore, not inconsistent with the contract or against the constitution of the society.

In this case what is complained of is a levy for losses, and it is conceded on the part of the society that under the old rules (that is, those which were in existence when the mortgage was made) there was no power to make such levy; they could not deduct this sum of £58 15*s.* 2*d.* from the sums payable to the member, because there was no power in the rules to make that levy against losses. The altered rules, it is said, gave this power. The alteration in question is contained in rule 51. That the power is there given as regards withdrawing members, I think cannot be questioned. The only possible comment on that is that which was made by Mr. *Roby*, when he urged that the provision that "shares in course of withdrawal should be subject to such deductions as the directors might require to make good any losses of the society" referred only to shares which on the 5th of October, 1883—the date of the new rules—were in course of withdrawal. It is a possible construction, but it does not to my mind seem a reasonable construction. I think it must mean shares which are in course of withdrawal from time to time when it becomes necessary to apply this rule. Withdrawn shares of course would not be affected by it. That would be entirely wrong, and probably *ultrà vires* the statute; at any rate, it would be against all sense to say that persons who had ceased to be members and who were perfect strangers to the society, who had gone away and severed their connection by withdrawal, should be still subject to losses, and they could not be subject to deductions because there was nothing remaining of theirs from which deductions could be made. So there is a class of past members who could not be affected. Then as to shares about which no proposals for withdrawals have been made, there is no occasion to make any deduction from them. The necessity does not arise until the withdrawal is in negotiation, and directly you have an application for withdrawal, and directly that is set on foot, then immediately the necessity for making a deduction arises in order that the account may be properly taken between the society and the withdrawing member; and that gives a rational and easy sense to the words "shares in course of with-

drawal." Far be it from me to say that the draftsman of these rules used the happiest expression for doing what he intended. I think he has succeeded in confusing us all; but when we look at the language and have the advantage of argument, I think the words cannot well mean anything other than I have stated.

The case of the mortgagor does not end there, because it is said that he is not a withdrawing member. In one sense he is not. He does mean to withdraw—that is part of his contention—but he is not in the proper sense of that clause a withdrawing member; and that is the society's own view, because they have another rule, the following one, No. 52, which deals with the power of redeeming. It is there as it was with this exception, and it is an important one, that rule 51, which is mentioned in the original rules, is now according to the altered rules to be read as rule 51 as amended. The result of rule 52 is that, as far as possible, regulations affecting withdrawals shall be applied to cases of redemption, and a member who is redeeming, whether he be withdrawing or not, must have his account taken as between himself and the society on the same basis as the withdrawing member, according to rule 51 as amended.

I will consider directly whether that is binding upon him; but that seems to me to be a tolerably clear meaning. We do not find any difficulty there in the result that this is a member withdrawing on the terms of redemption, or a combination of redemption and withdrawing, and, therefore, assuming the rules to be binding on him, he must submit to what is provided for by rule 51 as amended, and to such deduction as the directors may require to meet any losses of the society. Of course he is entitled to say that that must be properly done. Of course he is entitled to say that all the rules must be strictly observed, and that there must not be too large a sum deducted, and if there is anything like a suggestion of want of *bona fides* of course he would be at liberty to examine that closely. But in this case there is nothing of that kind. The directors have kept their accounts in an intelligible way, at any rate; that is, they have treated all the moneys due on the different properties as well secured. They have treated that as an asset worth 20*s.* in the

KEKEWICH, J.
1892
BRADBURY v. WILD.

pound throughout; but they know, or think they know—for it is only a matter of estimate—that some of these securities are deficient and will not eventually realize the full amount. Accordingly they have estimated the loss. They have put that estimated amount on the other side of the account and distributed it between the different members in proportion to their shares, the result being that this gentleman in respect of his 41½ shares has debited to him a loss of £58 15*s.* 2*d.* If he does not pay that, and if the estimated amount proves to be correct, as I must assume it will, the result will be that the £58 15*s.* 2*d.* will be thrown on all the other members and he will bear no part of it.

I repeat that one would expect to find that, being a member, and having all the advantages of membership, he would be made liable as much as any other member, notwithstanding that he happened to be an advanced member. That really depends on an examination of these two cases of *Rosenberg* v. *Northumberland Building Society* (1) and *Wilson* v. *Miles Platting Building Society* (2), to which I have already referred, and in each of these cases the words "for the time being" occur, and I must read Lord Justice *Cotton's* judgment (and he alone gave judgment in the *Miles Platting Case*) with reference to rules of that kind, particularly in the second passage which I read. The first is rather more general. It is impossible to say that the Lord Justice would have made those remarks if he had had rules before him of a different character; but the general principle with which he commences in the passage which I first read points to rules either having or not having the words "for the time being." The precise point came again before the Court in the other case, that is, in *Rosenberg's Case*. It was tried before Mr. Justice *Day* in the first instance without a jury, and he gave judgment for the mortgagor, and it was taken from him to the Court of Appeal. They reversed the learned Judge on the ground of the decision in the *Miles Platting Case*, which was not cited to Mr. Justice *Day*. That is not unimportant, because we know that Mr. Justice *Day* came to a conclusion unfettered by authority adverse to that which is insisted on by the society here

(1) 22 Q. B. D. 373. (2) 22 Q. B. D. 381, n.

as the right conclusion. But then it came before the Court of Appeal, and was argued at length, and judgment was given by all three of the learned Judges present, that is, Lord *Esher*, Lord Justice *Bowen*, and Lord Justice *Fry*. Lord *Esher* took great pains to rest his decision entirely on the *Miles Platting Case* (1), and says so in plain language, meaning, I take it, precisely what he says—"I need not stay to inquire whether, apart from that decision, I should have been of the same opinion for the reasons there given." I take it that Lord *Esher* did not intend to intimate what his opinion apart from authority was—that he meant loyally to follow a decision which was binding on him, and that he does not intend his judgment to be the slightest guide to other Judges except saying that they are bound, of course, by the decision. Lord Justice *Bowen* really comes to the same decision exactly; but Lord Justice *Fry* departed from that course, and he gave a judgment which certainly makes me think that he would not only have decided the *Miles Platting Case*, as it was decided, on the words then before the Court, but would have gone beyond that and have decided that the member was bound by the altered rules even without the words "for the time being." He cites the *Miles Platting Case*, and he uses the words "rules for the time being"; but he also uses this language (2): "It is obvious that the position of a mortgagor in the case of a mortgage to a building society is by no means the same as that of an ordinary mortgagor, and that his rights must be more or less affected by the contract of membership, as well as by the contract of mortgage. It is equally apparent, I think, that the contract of membership carries *in gremio* the right on the part of the society to alter the rules from time to time. That right is given by statute." Then there is another passage a little way further down, in which he says: "I think that point is well worthy of consideration, and it probably was taken into consideration by the Court in *Wilson* v. *Miles Platting Building Society*. In any case we are bound by that decision, and it appears to me to govern the present case." I cannot say that the Lord Justice decided the point which is before me; but he has given a strong indication of what he would have decided, and I have already

(1) 22 Q. B. D. 381, n. (2) 22 Q. B. D. 380.

KEKEWICH, J.

1892

BRADBURY v. WILD.

said that I gather that the Lord Justice *Cotton's* mind tended in the same direction. I cannot say more. My mind certainly goes very much in the same direction. It seems to me that a member seeking an advance on the terms of his observing the rules of the society, and making a contract which, although one of mortgage, is also one of membership, must be held bound by the rules from time to time made, so long as they are consistent with his contract. Alterations may vary the sum which he has to pay, and they may possibly vary his obligations in other respects, as to the time of payment, and so forth; but so long as they are consistent with his contract, and also consistent with the constitution of the society, it seems to me that a member of a building society must be just as much bound by a later rule whether he is or is not an advanced member. There is one possible answer to that which occurs to me, and which may be worth consideration. As a member he is certainly bound by the later rules. There is statutory power to alter them, and he is bound by the statutory majority; but it may be argued, and that really is the substance of the argument, that though bound as a member he is not bound as a mortgagor, and that the mortgage contract to that extent is separable from the membership contract. It seems to me that that is not so, and that the way Lord Justice *Fry* puts it is the right one—that the two things are intertwined so that you cannot separate the contract of membership from the contract of mortgage. It is an extremely important point with regard to these building societies; but that is my opinion, and, that being so, this gentleman must, in taking the account for the purpose of redemption, submit to that which has been honestly done by the directors in the exercise of their powers, and submit to a deduction from the amount payable by way of profits of this £58 15*s.* 2*d.*, and an account must be taken on that footing.

Solicitors: *L. Sykes, Manchester,* agent for *J. Cooke, Hyde; John Clayton, Manchester,* agent for *T. & G. F. Drinkwater, Hyde.*

C. C. M. D.

HUNTER *v.* DOWLING.

ROMER, J.

1892

Dec. 13, 14, 17.

[1891 H. 3195.]

Partnership—Value of Share of Deceased Partner—Direction to ascertain by Reference to Last Signed Annual Account—Death after Expiration of Partnership Year before Taking or Signing Account.

Where, under a partnership deed, the value of a deceased partner's share is to be ascertained by reference to the last annual account signed previously to his death, and such annual accounts are directed to be taken and signed by the partners at the end of each partnership year, or as near thereto as conveniently may be, if a partner dies shortly after the expiration of a partnership year, and before the account for that year has been actually signed or taken, the surviving partners cannot insist on the value of the share of the deceased partner being ascertained by reference to the last signed annual account; but the legal personal representative of the deceased partner is entitled to have the account taken for the partnership year which expired immediately before his death, and to have the value of his share ascertained by reference to such last-mentioned account—and this notwithstanding it has been the practice of the firm not to take and sign the annual account till a period of the year later than that at which the death occurred.

And, *semble*, that it is immaterial whether the account for the partnership year immediately preceding the death could or could not have been actually taken and signed between the end of such year and the date of the death.

EDMUND DOWLING, *Edwin Skelton Pinchin*, *Edward Arthur Johnson*, and *Charles Edmund Dowling*, entered into partnership as oil and colour merchants under a partnership deed, dated the 31st of March, 1884, the material provisions of which were as follows:—

"15. On the 31st day of March in each year during the continuance of the partnership, or as near thereto as conveniently may be, a general account shall be taken of the assets and liabilities of the partnership, and of all dealings and transactions of the partnership during the then preceding year, and of all matters and things usually comprehended in accounts of a like nature taken by persons engaged in a like business, and in taking such account a just valuation shall be made of all items requiring valuation, together with an estimate of all doubtful and bad

ROMER, J. 1892 HUNTER v. DOWLING.

debts; and in the general yearly account so to be taken there shall from time to time be made a balance-sheet, and the said balance-sheet shall be signed by all the partners in testimony of their approbation thereof, and the accounts to be so made and signed shall not afterwards be called in question, opened, or in any manner contravened after such yearly settlement as aforesaid."

"23. If any partner shall retire under the provisions hereinbefore contained, or shall die during the continuance of the partnership, the remaining or surviving partners shall (but subject in respect of a partner so dying to the power hereinbefore contained of bequeathing his share and interest in the partnership) accept and take, in the shares and proportions to which they shall at the time of such retirement or decease be interested in the profits of the partnership business, all the share and interest of the partner so retiring or dying in the capital of the business and the share of the profits of the partner so retiring or dying, and the amount of the share and interest of the partner so retiring or dying shall be taken at the amount appearing as standing to his credit in the last annual balance-sheet which shall have been signed previously to the date of such retirement or death, addition being made thereto on account of the proportion of profits which shall have accrued due to such partner since the last annual account according to the average amount of profits during the three years preceding the last annual account, if so many years shall have elapsed, and, if so many years shall not have elapsed, according to the average amount of profits during so many years as shall have elapsed."

"25. Whenever any doubt, difficulty, or dispute shall hereafter arise between the partners, or between one of them and the executors or administrators of the other, or between their respective executors or administrators, touching these presents, or the construction thereof, or any clause or thing herein contained, or any account, valuation, or division of assets, debts, or liabilities to be made as hereinbefore is mentioned, or any other thing in anywise relating to or concerning the partnership business, or the affairs thereof, or the rights, duties, conduct, or liabilities of either party in connection therewith, the matter in difference shall be referred to the two arbitrators, or their umpire, pursuant

to, and so as with regard to the mode and consequence of the reference, and in all other respects, to the provisions in that behalf contained in the *Common Law Procedure Act*, 1854, or any other subsisting statutory modification thereof."

As a matter of convenience the annual account was not usually taken until towards the end of April in each year, though it was then taken for the year ending the 31st of March. Accounts were so taken down to April, 1890.

Among the assets of the partnership were leasehold premises at *Hammersmith* and at *St. George's-in-the-East.*

In April, 1890, a general account and balance-sheet was made for the year ending the 31st of March, 1890; but in this account, although a value was placed on the *Hammersmith* premises, no value was placed on the leaseholds at *St. George's-in-the-East.*

On the 16th of June, 1890, the *London and Blackwall Railway Company* served the partners with notice to treat for part of the *St. George's-in-the-East* premises; and in August, 1890, the partners served the railway company with a notice requiring them to take all their premises. This was acceded to by the railway company; and in December, 1890, the partners made a claim for £28,000.

Negotiations then took place, which had not concluded on the 10th of April, 1891.

On that day *E. A. Johnson* died, having appointed *J. H. Hunter* his executor, who proved the will on the 6th of July, 1891.

After *E. A. Johnson's* death the negotiations with the railway company resulted in their purchasing the *St. George's-in-the-East* property for £19,000.

No account or balance-sheet for the year ending the 31st of March, 1891, was taken in *E. A. Johnson's* lifetime; but his Lordship held that such an account might have been taken between the 31st of March, 1891, and the date of his death.

J. H. Hunter commenced an action against the surviving partners, in which he claimed to be entitled to an account of the partnership dealings to the 31st of March, 1891; and to have *E. A. Johnson's* share in the partnership assets ascertained, including in such assets the £19,000 purchase-money.

ROMER, J.

1892

HUNTER v. DOWLING.

Neville, Q.C., and *Dauney*, for the Plaintiff:—

The Plaintiff is entitled to have the account taken down to the 31st of March, 1891, the end of the partnership year expiring immediately before the death of *E. A. Johnson*. It is immaterial that *Johnson* died before the account was actually taken or signed: *Pettyt* v. *Janeson* (1). The effect of ascertaining the rights of the parties by reference only to the last signed account would be that the Plaintiff would obtain nothing in respect of the premises taken by the railway company, which are now of considerable value—a result which would be most unfair, and which was not in the contemplation of the partners. [They were stopped.]

Chadwyck Healey, Q.C., and *J. M. Stone*, for the Defendants:—

The Defendants rely on the words of the deed and on the practice followed by the firm in taking the account. At the date of *E. A. Johnson's* death there was no account in existence except the one for the year ending the 31st of March, 1890, and the Plaintiff, under the express terms of the partnership deed, is bound by that. *Pettyt* v. *Janeson* only decides that the Court must treat that as done which ought to have been done; but here the Defendants have done everything that was required of them. The uniform practice of a firm in making out its balance-sheet must be regarded, and if made out according to that practice, it binds the parties, who cannot go behind it, though profit or loss has been made which is not shewn therein: *Ex parte Barber* (2). That case is more like the present one than *Pettyt* v. *Janeson*. A course of partnership usage with reference to taking the accounts, which is inconsistent with the articles, binds the partners: *Coventry* v. *Barclay* (3). Even if the account could have been taken and signed between the 31st of March, 1891, and the 10th of April, 1891—which the evidence shews was impossible—inasmuch as it was the practice of the firm to defer it, the last previous account governs the rights of the partners.

(1) 6 Madd. 146.

(2) Law Rep. 5 Ch. 687.

(3) 3 D. J. & S. 320.

1892. Dec. 14, 17. ROMER, J.:— ROMER, J.

1892

HUNTER v. DOWLING.

The principal clauses in the partnership deed on which the questions depend are those numbered 15 and 23.

Now, as to clause 15, it is important to consider, in the first place, what is its meaning and effect. I think it provides that, whenever there is a year completed of the partnership, the accounts shall be taken for that year and signed. The partnership year, as indicated by the clause and by the practice of the firm, was to end on the 31st of March. The words with which the clause commences, "On the 31st of March in each year during the continuance of the partnership, or as near thereto as conveniently may be," I think merely indicate, what would have been obviously the meaning without them, that the account might not be completed on the 31st of March—the absolute taking of it—but might in practice be taken and completed shortly afterwards. But I think the clause is clear that the account was to be taken as up to the end of each completed year, as is evident, I think, by the whole tenor of the clause, and particularly by the words "during the then preceding year." If a year of partnership was completed, then I think the parties were bound and entitled to have the account for that year taken, and not the less because afterwards one or more of the parties might die. The clause also provides that the account, when taken, is to be signed. Of course, that means if it can be signed. The fact that when taken it might not be capable of being signed by reason of the death, or physical inability to sign, of one partner, would not prevent the necessity of the account being taken as between the persons interested.

This being the meaning of clause 15, I now turn to clause 23. I ask myself, what is the meaning of the words in clause 23, with reference to the annual balance-sheet, "which shall have been signed previously to the date of such retirement or death"? I think those words are descriptive. They are, I think, used by reference to clause 15, which provided that the accounts of each completed year should be taken and signed, and, as I have pointed out, by that clause the parties were bound to take and sign the account for that year if it was completed. I think that clause 23 referred to the annual balance-

ROMER, J.
1892
HUNTER
v.
DOWLING.

sheet as signed, because clause 15 had provided for that being done, and that clause 23 contemplated what was to be done as having been done. I think this is borne out by the subsequent words in clause 23, which refer to the "last annual account" as being synonymous with the "annual balance-sheet which shall have been signed previously to the date of such retirement or death." The authorities in fact shew that in clauses like clause 23 the absolute signing is not essential, nor is indeed the absolute taking of the account essential, if the account, according to the articles, ought to have been taken and signed. Indeed, the Defendants' counsel did not dispute this proposition generally, but based their case on what appears to me a somewhat startling proposition, namely, that in cases of this kind, if the partner dies so soon after the account day that the account up to that time could not with reasonable speed be taken in the meantime, then the account which governs the relation of the parties is the immediately preceding account. No authority was cited in support of this. I think it would operate unfairly and lead to manifest inconveniences, not the least of which would be the necessity of inquiry in each case, whether the account could or could not be reasonably made up in so many days. Nor do I think that this is the true meaning of clauses of the kind. I think they really mean—in the absence of something special to the contrary, which does not exist in the present case—that when a partner dies after an account day, then the account taken or to be taken as of that day is the one that governs the rights of the parties. I do not think that the partner dying must have been living when the account was in fact completed, or that his representatives are bound to shew that it might have been completed before he died. It is to be borne in mind that there is no difficulty in taking the account as to the past, though one partner may have died since that day and before the account is actually completed. I may add that in the present case, if the fact be really material—and in my view it is not—I do not come to the conclusion, notwithstanding Mr. *Dowling's* evidence, that the account could not have been taken and signed between the 31st of March and the date of Mr. *Johnson's* death, though I agree that in the ordinary course

the parties probably would have taken some time longer. Coming, therefore, to the conclusion at which I arrive, that the account to be taken as to the 31st of March, 1891, is that which governs the rights of the parties, it is clear that, under the circumstances, I must make a declaration that an account ought to be taken, as provided for by clause 15 of the articles, up to the 31st of March, 1891.

With regard to the special point in dispute, it is clear that on the 31st of March, 1891, the leaseholds in question were, at any rate, to some extent valuable, and they ought, therefore, to be valued as an asset, and not the less because in the accounts of the 31st of March, 1890, when the leaseholds were not, or at any rate, were not considered, valuable, they were not valued. There is no practice of the partnership that leaseholds should not be valued; on the contrary, some leaseholds of the firm were valued in the other accounts. This particular lease was only granted on the 24th of June, 1889, and the fact that it was not valued on one occasion cannot establish a principle that under no change of circumstances was it to be valued if it became valuable. I shall make a further declaration, that in taking the accounts the leaseholds in question ought to be valued as of their value on the 31st of March, 1891. As to what value will be put on this leasehold in question, I say nothing. I do not wish to prejudice the arbitrators in any way.

Solicitors for Plaintiff: *Hunter & Davies.*
Solicitors for Defendants: *Stones, Morris, & Stone.*

F. E.

VAUGHAN WILLIAMS, J.

1892

Nov. 19; *Dec.* 3.

In re REAL ESTATES COMPANY.

[00142 of 1892.]

Company—Winding-up—Transfer of Liquidation—Transfer from High Court to Court without Bankruptcy Jurisdiction — City of London Court—Transfer to High Court of Liquidation of Building Society—Companies (Winding-up) Act, 1890 (53 & 54 *Vict. c.* 63), *ss.* 1 *sub-s.* 5, 3—*Building Societies Act*, 1874 (37 & 38 *Vict. c.* 42), *ss.* 4, 32 [*Revised Ed. Statutes, vol. xvii., pp.* 209, 215]—*Order of Lord Chancellor of the* 29*th of November*, 1890—*County Court Rules*, 1892, *r.* 146.

There is no power to transfer the winding-up of a company to a Court which has been excluded by the Lord Chancellor from having jurisdiction, under the *Companies* (*Winding-up*) *Act*, 1890, to wind up such company:—

Semble, that, notwithstanding rule 146 of the County Court Rules, 1892, there is no power to transfer from the City of London Court, or any County Court, to the High Court, the winding-up of a society registered under the *Building Societies Act*, 1874.

In re London and Suburban Bank (1) approved.

ON the 4th of October, 1892, an order was made by Mr. Commissioner *Kerr*, in the City of *London* Court, for the winding-up by that Court of the *Liberator Permanent Benefit Building Society*, which was a society registered under the *Building Societies Act*, 1874 (37 & 38 Vict. c. 42).

Under the County Court Rules of 1892, rule 146, and the Order of the Board of Trade of the 16th of September, 1892, Mr. *C. J. Stewart* was the Official Receiver and provisional liquidator of the *Liberator Society*.

On the 9th of November, 1892, an Order was made in the High Court of Justice, by Mr. Justice *Vaughan Williams*, to wind up the *Real Estates Company, Limited*, and thereupon Mr. *C. J. Stewart* was Official Receiver and provisional liquidator of this company, under the order of the Board of Trade of the 1st of January, 1891.

The affairs of the society and the company were intimately connected with each other, and on the 14th of November, 1892, Mr. *Stewart*, as Official Receiver and provisional liquidator of

(1) [1892] 1 Ch. 604.

the *Real Estates Company*, by the direction of Mr. Commissioner *Kerr*, applied by *ex parte* summons that the winding-up proceedings, in the matter of the *Real Estates Company*, might be transferred to the City of *London* Court.

This summons was adjourned into Court, and was heard before Mr. Justice *Vaughan Williams* on the 19th of November, 1892.

Theobald, in support of the summons:—

Great inconvenience is caused by the two liquidations being in different Courts. The *Real Estates Company* was really an *alias* of the *Liberator Society*, and is indebted to it in a large amount.

The power to transfer is given by sect. 3 of the *Companies (Winding-up) Act*, 1890.

Buckley, Q.C., and *Whinney*, for mortgagees of the *Real Estates Company*:—

Counsel for the mortgagees can scarcely oppose the application for transfer; but the Court may allow them to state some objections which exist in respect of the proposed transfer.

Under rule 8 of 1890, the Judge may, "for good cause shewn," order the winding-up proceedings to be transferred from the High Court to another Court. This shews that the order will not be made as a matter of course. It was not without reason that sect. 1, sub-s. 2, of the Act of 1890 provided that where the amount of capital paid up, or credited as paid up, exceeded £10,000, the petition to wind up the company should be presented to the High Court. Here the figures are very large, and, no doubt, the affairs of both companies are so mixed up that it would be advisable to bring both liquidations before the same tribunal. But this should be effected, not by sending this liquidation to the City of *London* Court, but by bringing the liquidation of the *Liberator Society* to this Court.

By rule 146 of the County Court Rules, 1892, the provisions of the *Companies Acts*, 1862 to 1890, and the rules made thereunder, so far as they relate to winding up, shall apply to the winding up of societies registered under the *Building Societies Act*, 1874, and the *Industrial and Provident Societies Act*, 1876;

VAUGHAN WILLIAMS, J.

1892

In re REAL ESTATES COMPANY.

and the winding up of any such societies shall be conducted in all respects as if such societies were companies registered under any of the said *Companies Acts.*

This rule seems to extend the provisions of the Act of 1890, with reference to transferring liquidations, to the case of a registered building society.

1892. Dec. 3. VAUGHAN WILLIAMS, J.:—

This is a summons in the matter of the *Real Estates Company*, and it asks that all further proceedings in the liquidation of that company may be transferred to the City of *London* Court.

I should be extremely anxious, if I had the power, to make the order asked for by the summons, because I am informed that the company is very intimately connected with the *Liberator Society*, which is being wound up in the City of *London* Court, and it seems quite plain that the desirable thing to do would be to have the winding-up of this company conducted by the same authority that is winding up the *Liberator Society*, which is the principal matter, this company being merely subsidiary to the *Liberator Society.*

I have, however, arrived at the conclusion that I have no power to make the transfer which I am asked to make.

sect. 3 power to transfer winding-up proceedings is given by says that, the *Companies* (*Winding-up*) *Act*, 1890. That section therein may a winding-up of a company, or any proceedings without applicat time and at any stage, and either with or ferred from one Co rom any of the parties thereto, be trans- the Court in which t to another Court, or may be retained in it may not be the Cou proceedings were commenced, although been commenced." N which the proceedings ought to have Court," in that section n my judgment, the words "another jurisdiction under the A t necessarily mean a Court having have no power to transfe wind up, and, in my judgment, I City of *London* Court winding-up of any company to the wind up the company. s that Court has jurisdiction to would have no jurisdic did so, the City of *London* Court o continue the winding-up, and

when the matter was transferred there, the transfer would be futile.

That the City of *London* Court would have no jurisdiction to wind up this company seems plain, the matter being governed by the provisions to which I will presently refer.

Sect. 1, sub-sect. 5, of the Act of 1890 enacts as follows: "The Lord Chancellor may by order exclude a County Court from having jurisdiction under this Act, and for the purposes of such jurisdiction may attach its district, or any part thereof, to the High Court or to any other County Court, and may revoke or vary any such order. In exercising his powers under this section the Lord Chancellor shall provide that a County Court shall not have jurisdiction under this Act unless it has for the time being jurisdiction in bankruptcy." An order was made by the Lord Chancellor under sect. 1, sub-sect. 5, of the Act of 1890, on the 29th of November, 1890, and that order says that: "A County Court which at the time of the coming into operation of the *Companies* (*Winding-up*) *Act*, 1890, is excluded from having jurisdiction in bankruptcy shall be excluded from having jurisdiction under the *Companies* (*Winding-up*) *Act*, 1890, until further order, and the district of any such County Court shall for the purposes of jurisdiction under the *Companies* (*Winding-up*) *Act*, 1890, be attached until further order to the Court to which that district is attached at the time of the coming into operation of this Act for the purposes of jurisdiction in bankruptcy." That being so, the question then comes to be, whether or not the City of *London* Court had, at the time of the coming into operation of the Act of 1890, jurisdiction in bankruptcy.

Sect. 96 of the *Bankruptcy Act*, 1883, provides that "The *London* bankruptcy district shall, for the purposes of this Act, comprise the City of *London* and the liberties thereof, and all such parts of the metropolis and other places as are situated within the district of any County Court described as a metropolitan County Court in the list contained in the third schedule." It is quite true that the City of *London* Court is not included in that third schedule; but the district over which it has jurisdiction is part of the district referred to in sect. 96 of the *Bankruptcy Act*, 1883. Under these circumstances, it seems to me that,

VAUGHAN WILLIAMS, J.

1892

In re REAL ESTATES COMPANY.

there being in the City of *London* Court no jurisdiction to wind up this company, I have no power to transfer these winding-up proceedings to that Court.

Although the question is not raised on this summons, it has been suggested that the inconvenience of having the two liquidations pending in different Courts might be got over by transferring the proceedings which are pending in the City of *London* Court, for the winding up of the building society, to this Court. But, in my opinion, there is no power to make such a transfer. That seems to be the effect of the decision of Mr. Justice *North* in *In re London and Suburban Bank* (1). The head-note of that case is, so far as material, as follows: "A society registered under the *Industrial and Provident Societies Act*, 1876, is not within the *Companies* (*Winding-up*) *Act*, 1890, and cannot be wound up under that Act. Such a society can only be wound up by the proper County Court." The County Court is also the Court having jurisdiction to wind up building societies registered under the *Building Societies Act*, 1874. (See 37 & 38 Vict. c. 42, ss. 4, 32).

Under these circumstances, I am afraid I cannot take any step to bring these two liquidations together in a way in which, in my judgment, it would be for the benefit of every one concerned that they should be brought together. I must, therefore, dismiss the summons.

Solicitors for Applicant: *Thorne & Welsford.*

Solicitors for *Lands Allotment Company: Lawrance, Waldron, & Webster.*

(1) [1892] 1 Ch. 604.

F. E.

In re NEW ZEALAND TRUST AND LOAN COMPANY.

C. A. 1892 Nov. 12.

Practice—New Trustees, Appointment of—Limited Company—Shares not fully paid up—Vesting Order, Form of—"Stock"—"Into the names" of New Trustees—"Any purchaser or purchasers"—Trustee Act, 1850 (13 & 14 *Vict. c.* 60), *ss.* 2, 31, 35 [*Revised Ed. Statutes, vol. x., pp.* 982, 990]—*Trustee Extension Act*, 1852 (15 & 16 *Vict. c.* 55), *s.* 6 [*Revised Ed. Statutes, vol. xi., p.* 327].

A vesting order as to stock or shares under sect. 35 of the *Trustee Act*, 1850, upon the appointment of new trustees by the Court, should vest in the trustees simply "the right to call for a transfer of, and to transfer" the stock or shares, "and to receive the dividends or income thereof." The order should not go on to direct the trustees to transfer "into their names": and, although the language of sect. 31 is sufficient to authorize the insertion of the words "to any purchaser or purchasers," as in *In re Peacock* (1), they should not be inserted except under special circumstances.

In re Peacock considered.

"Stock" in the *Trustee Act*, 1850, and the *Trustee Extension Act*, 1852, includes shares in a limited company, whether fully paid up or not.

APPEAL from Mr. Justice *Chitty*.

The *New Zealand Trust and Loan Company, Limited*, was incorporated in December, 1862, under the *Companies Act*, 1862, with a capital of £500,000 in 20,000 shares of £25 each. Clause 16 of the articles of association was as follows: "The company may decline to register any transfer of shares made by a member who is indebted to them, and may, without assigning any reason therefor, decline to register any transfer of shares not being fully paid up."

Elizabeth Alcock, widow, was, at the date of her death, the registered holder of 491 shares of £25 each in the company, upon each of which £5 only had been paid up. Mrs. *Alcock* died on the 28th of December, 1890, having by her will, dated in 1886, appointed her sons *Arthur Alcock*, *John Forster Alcock*, and another person, her trustees and executors, to whom, after a specific bequest, she devised all her real and personal estate in trust for sale and conversion. Her will was proved in February, 1891, by her said two sons alone.

In July, 1891, a deed of transfer was executed vesting the

(1) 14 Ch. D. 212.

C. A. 1892 *In re* New Zealand Trust and Loan Company.

491 shares in the sole name of *Arthur Alcock*, who was thereupon registered as the holder of the shares, a fresh certificate of the whole of the shares being granted to him alone.

In November, 1891, *Arthur Alcock* absconded, whereupon the company were served with a distringas by *John Forster Alcock*, stopping the receipt of the dividends on the shares as well as any dealings with the shares themselves.

In January, 1892, a receiving order in bankruptcy was made against *Arthur Alcock*.

By an order made in Chambers by Mr. Justice *Chitty* on the 8th of March, 1892, in an action, commenced by originating summons, by the beneficiaries under the will against *Arthur Alcock* and *John Forster Alcock*, *Charles Alcock* was appointed a trustee of the will in substitution for *Arthur Alcock*, jointly with *John Forster Alcock*. The order then proceeded as follows: "And it appearing by the affidavit of the said *John Forster Alcock* filed, &c., that the testatrix was at the time of her death beneficially entitled to the stocks and shares mentioned in the schedule to this order, which are now standing in the names of the said *John Forster Alcock* and *Arthur Alcock*, except the 491 shares in the *New Zealand Trust and Loan Company*, which are standing in the name of the said *Arthur Alcock* alone, but as trustee for the estate of the said *Elizabeth Alcock*: It is ordered that the right to call for a transfer of and to transfer the said sums of stock and shares specified in the schedule hereto to any purchaser or purchasers, and to receive the dividends accrued and to accrue thereon, do vest in the said *John Forster Alcock* and *Charles Alcock* as such trustees of the will of the said *Elizabeth Alcock* as aforesaid, the said *John Forster Alcock* and *Charles Alcock* by their solicitors undertaking to hold the proceeds of the sale thereof (if any) upon the trusts of the said will: And it is ordered that the right to sue for and recover any *chose in action* subject to the trusts of the said will, or any interest in respect thereof, including any dividends or interest on the said stocks and shares, and also the moneys in the hands of the *Union Bank of London* in the joint names of the said *John Forster Alcock* and *Arthur Alcock*, do vest in the said *John Forster Alcock* and *Charles Alcock* as such trustees as aforesaid."

The schedule comprised, amongst other securities, the 491 shares in the *New Zealand Company*.

A copy of the order was thereupon sent by *John Forster Alcock* and *Charles Alcock*, the trustees, to the secretary of the company.

In making the order Mr. Justice *Chitty* said he felt himself bound to follow the form indicated in *In re Peacock* (1).

In May, 1892, *John Forster Alcock* and *Charles Alcock* sold and transferred one of the shares for value to *Samuel Robert Earle*, and sent the deed of transfer to the company for registration; but the company refused to register it, or in any way to recognise the vesting order of the 8th of March, 1892, on the ground that the transferors were not the registered holders of any of the 491 shares, all being still standing in the name of *Arthur Alcock*, and that they, the company, were entitled to a vesting order in a form shewing clearly who was to be registered.

The trustees and *Earle* then served the company with a notice of motion under sect. 35 of the *Companies Act*, 1862, to rectify the register of members of the company by removing the name of *Arthur Alcock* as the holder of the one share sold, and inserting therein the name of *Earle*. On the 1st of July, 1892, Mr. Justice *Chitty* made an order for rectification accordingly.

The company appealed from that order.

(1) 14 Ch. D. 212. The material part of the order in *In re Peacock*—which was intituled in Lunacy and in the Chancery Division—was as follows: After appointing *John Bushby Hampson*, the proposed new trustee, to be trustee of the will in substitution for *Nancy Peacock*, the lunatic trustee, jointly with *Eugénie Peacock* and *Anne Peacock*, the other existing trustees, the order proceeded: "And it being stated to be the intention of the said *Eugénie Peacock* and *Anne Peacock*, and of the said *John Bushby Hampson*, to sell the property secured by investments not authorized by the said will, and they are now undertaking before us to sell such last-mentioned property, we do order that the right to call for a transfer of and to transfer into their own names, or otherwise to a purchaser or purchasers, the following stocks and shares, and to execute all such deeds and instruments as may be necessary for the purpose, do vest in the said *Eugénie Peacock* and *Anne Peacock* and *John Bushby Hampson*, that is to say"—then followed the stocks and shares—"And we do order that the right to receive the dividends due (if any) and to accrue due on all or any or either of the before-mentioned stocks and shares do vest in the said *E. Peacock* and *A. Peacock* and *J. B. Hampson*." Then followed vesting orders as to the lands, chattels, and mortgage debts subject to the trusts of the will.

C. A.

1892

In re NEW ZEALAND TRUST AND LOAN COMPANY.

The appeal was heard on the 12th of November, 1892.

Latham, Q.C., and *Howard Wright*, for the company, Appellants:—

This vesting order is wrong in form. The form required by sect. 35 of the *Trustee Act*, 1850 (13 & 14 Vict. c. 60), which is the section applicable to this case, is one vesting "the right to call for a transfer" simply, not "the right to transfer." The practical and most convenient course is for the trustees to have power to transfer to themselves and to no one else. When "the right to call for a transfer" is vested in the trustees under sect. 35, then, under sect. 6 of the *Trustee Extension Act*, 1852 (15 & 16 Vict. c. 55), "the right to transfer" vests accordingly, that is, the right to transfer to themselves. "Stock" in both sections includes "shares": *In re Angelo* (1).

[LINDLEY, L.J.:—The common form given in *Seton* on Decrees (2) is that "the right to call for a transfer of and to transfer" shall vest—the same as we have here.]

But the form goes on to direct that the transfer shall be "into their own names;" that is the universal practice; whereas here the order does not say that the transfer shall be made "into the names" of the new trustees. This is an important matter for a company, for under an order in the present form a bankrupt shareholder, against whom calls could not be enforced, might be placed upon the register, and might remain there, although the dividends might be received by some one else, such as his trustee in bankruptcy. These shares not being fully paid up, the order ought not to have been made in this form in the absence of the company; having been made in their absence, the company ought not to be affected by it. The learned Judge below, in putting in the words "to any purchaser or purchasers," considered himself bound by *In re Peacock* (3); but the form there given has never been generally accepted as a precedent, and the forms in *Seton* are different.

[BOWEN, L.J.:—Where is the authority for putting in "to any purchaser or purchasers"?]

(1) 5 De G. & Sm. 278. (2) 4th Ed. p. 542, *et seq.*
(3) 14 Ch. D. 212.

Apparently under the words "or otherwise" in sect. 6 of the Act of 1852. The practical difficulty arising from the insertion of the words "to any purchaser or purchasers" is that they throw upon the company the duty of ascertaining who is or are the "purchaser or purchasers"; and the company ought not to be put upon that inquiry. The order ought to say nothing about a transfer: it ought only to vest in the trustees the right "to call for a transfer," that is, to themselves, leaving the Act of Parliament to give the right to transfer to other persons. The common practice is to insert a direction to the trustees to transfer "into their own names," and nothing more: *Seton* on Decrees (1).

[Lindley, L.J.:—I certainly doubt whether the insertion of the words "to any purchaser or purchasers" was regular. It does not appear to me that in *In re Peacock* (2) the question whether those words should be inserted was really discussed; they seem to have been put in at Mr. *Ingle Joyce's* suggestion, in order to get over a difficulty.]

The order in that case was made, not under sect. 35 of the Act of 1850, but in Lunacy and in Chancery under sects. 15 and 26.

[Lindley, L.J. (after conferring with Mr. *Jackson*, the Registrar of the day):—Mr. *Jackson* informs us that *Tripp's* forms are as often followed by the Registrars as *Seton's*. I observe that the form of vesting order given in *Tripp* (3) directs simply that "the right to call for a transfer of, and to transfer" the stock, "and to receive the dividends or income thereof, do vest in" the new trustees, and does not go on to direct the trustees to transfer "into their names," as the form in *Seton* does. I think *Tripp's* form the neater of the two, and that it is better that the order should not go on to direct the trustees to transfer "into their names."]

Again, even if the present order vested merely "the right to call for a transfer," it ought not to have gone on to vest the right to receive the dividends also, for sect. 35 says the Court may make an order vesting the right to call for a transfer "or"

(1) 4th Ed. p. 509. (2) 14 Ch. D. 212. (3) Pages 222–3.

C. A. 1892 *In re* New Zealand Trust and Loan Company.

—not "and"—the right to receive the dividends. The insertion in the order of an undertaking by the trustees to find a transferee who would be acceptable to the directors of the company and a direction to transfer to him would cover our objection to a great extent; but as we were no parties to the order, we do not see how we could enforce such an undertaking, and, therefore, we should prefer a direction to transfer "into the names" of the trustees. Where it is desired to transfer to persons other than those in whom the right to call for a transfer is vested, the rule is to insert the names of the transferees in the order: *King of Hanover* v. *Bank of England* (1). The practice of naming the transferees has grown up under sect. 31 of the Act of 1850, which gives the Court power to direct the manner in which the vested right to call for a transfer shall be exercised; the object of the practice being to protect corporations. The practice of the *Bank of England* is to have a direction for a transfer "into the names" of the trustees: *In re Glanville's Trusts* (2).

Farwell, Q.C., and *G. Henderson*, for the Respondents, the trustees and *Earle*:—

[Lindley, L.J.:—Do you object to the omission of the words "to any purchaser or purchasers"?]

The words were put in for the protection of the *cestuis que trust*. Their omission would not concern us, the Respondents; but it would be dangerous to alter the practice adopted in *In re Peacock*, where the words were put in advisedly. But we submit that the words cannot be ordered to be struck out on this appeal; for this is not an appeal from the vesting order itself, but an appeal under sect. 35 of the *Companies Act*, 1862; and, further, your Lordships have not now before you the parties in whose presence the order was made, namely, the *cestuis que trust* as well as the trustees. Upon the general question, it is most important that trustees and executors should not be obliged to go on to the register of shareholders of a company in respect of shares held by their testator, if they find that the shares entail a heavy liability.

(1) Law Rep. 8 Eq. 350. (2) W. N. (1878) 21.

This order is entirely in accordance with sect. 31 of the Act of 1850, and sect. 6 of the Act of 1852. Sect. 31 says that the Court may "give directions concerning the manner in which the right to any stock or *chose in action* vested under the provisions of this Act shall be exercised"; and sect. 6 says that the person or persons in whom the right to transfer or call for a transfer is vested, may perform all acts relating to the transfer into his or their own name or names, "or otherwise, to the extent and in conformity with the terms of the order." According to the Appellants' contention, no effect is to be given to the words "or otherwise."

[They were stopped by the Court.]

Latham, in reply.

LINDLEY, L.J.:—

This is an appeal from an order made by Mr. Justice *Chitty* in the matter of the *Companies Acts* and of the *New Zealand Trust and Loan Company*. The order that was made was made on the motion of *John Forster Alcock* and *Charles Alcock*, who are seeking to transfer a certain share in the company, and also on the application of a Mr. *Earle*, who is prepared to be registered as the transferee; so that we have before us the proposed transferors and the proposed transferee; and Mr. Justice *Chitty* has ordered that the register of shareholders of the company shall be rectified by substituting the name of the proposed transferee, Mr. *Earle*, for that of *Arthur Alcock*, the name at present on the register as the holder of the share in question. The company object to this, and they object, not because Mr. *Earle* is a pauper or an improper person to be registered as a shareholder, but on the ground that, according to the practice of the Court of Chancery, the order of Mr. Justice *Chitty* is in such a form that the Court ought not, in the exercise of its discretion, to compel them to accept the transfer under it.

The case arises in this way. It appears that Mrs. *Elizabeth Alcock* held 491 shares in the company of £25 each, on which £5 per share had been paid; consequently, the shares involved a liability of £20 per share, or £9820 altogether. Mrs. *Alcock*

C. A. 1892 *In re* New Zealand Trust and Loan Company. Lindley, L.J.

died, and her executors, who were not bound to take the shares themselves or to take a transfer of them into their names, transferred them to her son, *Arthur Alcock*, who thus became and now stands in the company's books as the transferee. He is the registered holder of the shares. It is true that, as between himself and the beneficiaries under the will, he is only a trustee of the shares, but the company have nothing to do with that; however, he is, in fact, trustee for the persons entitled to these shares beneficially under the will of Mrs. *Alcock*. He has gone away and become bankrupt, and the trustees of the will, wanting to get the shares into a state in which they could be dealt with, applied to Mr. Justice *Chitty* in a Chancery action commenced by originating summons, and this order was made by Mr. Justice *Chitty*: I will read the whole of it. [His Lordship read the order as above stated, and proceeded:—] Having got that order, these two gentlemen transferred one of the shares to Mr. *Earle*, whose name is the only one before us; and the transferors go to the company and say, "Register Mr. *Earle* as the holder of this share." The company, however, say, "No; this order is embarrassing, and, acting under the power given by article 16 of the articles of association to decline to register any transfer of shares not fully paid up, we object to do so; for if we accept the order in this form we shall be embarrassed hereafter." That gives rise to the question whether there is any reasonable ground of objection, in the company's point of view, to this order, and Mr. *Latham* has argued the several objections. In the first place, he says that sect. 35 of the *Trustee Act*, 1850, does not apply to shares not fully paid up. I confess I was somewhat startled by that. I have known orders made under the Act, with regard to shares not fully paid up, for the last thirty years; but still it does not follow that it is right. I cannot help thinking, however, looking at sect. 2, that the language is ample enough to comprise shares not fully paid up. In *In re Angelo* (1) it was held that the definition of the word "stock" in sect. 2 applied to "shares" in a joint stock company; but I do not know that the point now taken by the Appellants has arisen before for decision with regard to shares not fully paid up. I should say that the practice

(1) 5 De G. & Sm. 278.

of making orders under the Act extending to shares not fully paid up is well founded; and, in my opinion that objection is untenable.

Another objection was that the name of the proposed transferee ought to appear in the order, and that an order vesting in certain persons the right to call for a transfer ought not to leave out the name of the proposed transferee. The company say they would like the name of the transferee or transferees submitted to them in every case before the order is drawn up. The *Trustee Acts*, 1850 and 1852, have been in operation for years; orders have been constantly drawn up under them, and there is nothing in them that I know of requiring that the name of a transferee should be inserted in any order. I cannot hold judicially that this order is imperfect or wrong by reason of the omission of the names of the transferees.

Then Mr. *Latham* says that the insertion of the words "to any purchaser or purchasers" is not warranted by the Acts, and that the words ought to come out. If that is a reasonable objection, we must order, in effect, the words to be struck out. Technically we could not alter the terms of the order, because it is not under review, but we could decline to order the company to register the name of a particular transferee. With regard to the power of the Court to put those words in, it appears to me that sect. 31 of the Act of 1850, although it certainly does not require the Court to put them in, yet authorizes them to be put in. Mr. *Farwell* has given a reason for that, namely, the protection of the *cestuis que trust*. Mr. Justice *Chitty*, it seems, put the words in because he felt himself bound by the form of order made in *In re Peacock* (1); but I cannot myself hold that case to be an authority for the proposition that these words must be put into the order whenever it is desired to transfer the shares to persons other than the trustees themselves, the trustees being the persons in whom the right to call for a transfer is vested. I should have thought it would be better to leave them out in the absence of any special reason for putting them in. But I do not think that the insertion of these words in the order was beyond the discretion of the Judge. The company, however, suggest this: "We may be

(1) 14 Ch. D. 212.

C. A. 1892 *In re* New Zealand Trust and Loan Company. Lindley, L.J.

embarrassed; the name of the wrong person may be put into the transfer, or there may be some fraud of that kind: the transferors may make a transfer first to *A.* and then to *B.*, and we may be put upon inquiry who is the purchaser." That is a purely speculative suggestion, and I doubt whether the company would be embarrassed even if that happened; but this is an application by Mr. *Earle*, the transferee, himself. Although the words "to any purchaser or purchasers" may possibly be in common form, it might be better as a general rule to leave them out; but the Court has, in my opinion, power to put in the words, and in a reasonable case may put them in.

Then Mr. *Latham* says that the transferors should be put under some undertaking to find a transferee acceptable to the directors, and that such undertaking should be put into the order. Of course we cannot put that in.

Then Mr. *Latham* says that we should put into the order an expression that the right to transfer should be "subject to the articles of the company." I do not see why the Court should put that in or alter the form of order which has been in use for so many years. Mr. *Latham* is right in saying that the order does not affect the rights of the company under the memorandum and articles; but it is not necessary to express that in the order. I do not see why we should put in words that are not wanted.

The result is that all these objections fail, and the appeal must be dismissed with costs.

Bowen, L.J.:—

I am of the same opinion.

A. L. Smith, L.J.:—

I have nothing to add.

Solicitors: *Freshfields & Williams; Wilson & Son.*

G. I. F. C.

SKINNER & CO. *v.* SHEW & CO.

C. A.
1892
NORTH, J.
July 1.
C. A.
Nov. 21.

[1892 S. 1847.]

Patent—Patentee—Action to Restrain Threats of Legal Proceedings—Threats by Letters in answer to inquiries—Privilege—Patents, Designs, and Trade Marks Act, 1883 (46 & 47 *Vict. c.* 57), *s.* 32.

Threats of legal proceedings for infringement of patent rights are actionable whether addressed to the infringer himself or intimated to a third person, and are none the less "threats" within the meaning of the section because they are made in answer to inquiries.

In construing the expression in sect. 32, threats "by circulars, advertisements, or otherwise" the words "or otherwise" are to be read, not as being restricted to threats by measures *ejusdem generis* with "circulars or advertisements," but as extending the previous words so as absolutely to prohibit any threats whatever of legal proceedings unless the case comes within either of the two provisoes at the end of the section.

In an action to restrain threats of legal proceedings under sect. 35, no defence can be based upon the ground that what the Defendant did was done *bonâ fide*, or that it was done on a privileged occasion.

The decision of *North*, J., affirmed.

APPEAL from Mr. Justice *North*.

The Plaintiffs and the Defendants were rival manufacturers of photographic cameras. The Defendants were patentees of a camera called by them the "*Eclipse*," under a patent (No. 4102 of 1885) granted on the 1st of April, 1885.

On the 20th of November, 1891, the Plaintiffs applied for a patent, and filed a provisional specification (No. 20177 of 1891) in respect of a portable photographic camera.

On the 12th of February, 1892, the Defendants were informed by letter from the *London Stereoscopic Company*, who were business connections of theirs, that there had been submitted to them, with the view of placing it upon the market, a folding hand camera which bore some resemblance to the Defendants' own *Eclipse* camera; and that as the company did not wish to infringe the Defendants' patent, they thought it better to send the camera in question to the Defendants, and to "ask whether the Defendants thought it in any way encroached upon their rights."

On the 13th of February the Defendants wrote to the company

C. A. 1892

SKINNER & Co. v. SHEW & Co.

in reply saying that "the camera shewn to us is undoubtedly in our opinion an imitation of ours and an infringement."

An interview took place between the Defendants and a representative of the company on the 17th of February, and on the 18th of February the Defendants wrote to the *London Stereoscopic Company*: "We beg to confirm our opinion previously expressed that the camera in question is an infringement of our patent No. 4102 of 1885. . . . We have taken further advice in the matter and are prepared to stop the sale of this camera if placed upon the market. If you are willing to do so, it would save time and trouble if you would give us the name of the manufacturer, and we will communicate direct with him."

The company then, on the 19th of February, through their solicitors, wrote to the Plaintiffs, sending a copy of the Defendants' letter of the 18th of February, and declining to continue their negotiations with the Plaintiffs, and saying that however useful the Plaintiffs' invention might be, the company could not submit themselves to the risk of a law suit.

In consequence of this letter the Plaintiffs wrote to the Defendants on the 20th of February, stating that they were fully prepared to defend any action the Defendants might bring, that they could not entertain the idea of withdrawing their camera from the market, and that they had a number in hand which would be in the market directly.

The Defendants then, on the 23rd of February, wrote to the Plaintiffs as follows: "In reply to yours of the 20th, we can only confirm ours of the 18th to the *London Stereoscopic Company* that we considered the camera an infringement of our patent No. 4102 of 1885 . . . . and are prepared to take action to stop the sale. In order that we may go further into the matter before loss of time is incurred, if you would send us a camera, and give us the number of the patent, it would be an aid to our further investigation of the matter, saving unnecessary expense."

The Plaintiffs answered on the 2nd of March that they were placing the Defendants' letter and the other documents in the hands of their solicitors; and on the 8th of March those solicitors wrote to the Defendants that their clients were satisfied that

their invention was patentable, and would at once file a complete specification and leave the Defendants to contest the question. They continued: "We shall be obliged by your informing us on what grounds you consider our clients' invention is an infringement of your patent. Mr. *Skinner* will also at once proceed to sell the camera which he has manufactured. We are informed that our clients' invention is quite distinct from your patent, No. 4102 of 1885 . . . . Moreover, we observe that a question has been raised as to the validity of patent No. 4102 of 1885 by your own patent agent."

On the 9th of March the Defendants wrote that before answering this letter they would "ask your clients (as we have already by our letter to them of the 23rd ultimo) to send us one of the cameras referred to by you, which they can debit us with in the usual way, that we may be able to point out where we claim it to be an infringement of our patent."

The Plaintiffs' solicitors then wrote a letter on the 11th of March to the Defendants, in which, after alleging that the Defendants' patent was invalid, and refusing to furnish a model of the Plaintiffs' camera, they said: "The action you have taken in this matter has stopped a very remunerative contract between our clients and the *Stereoscopic Company*, and in consequence our clients have already lost the trade for the most important part of the season. We have now to give you notice that we shall issue a writ for injunction and damages, on Tuesday morning, unless an arrangement is come to satisfactorily compensating our clients for the damage they have sustained, and unless we obtain from you an undertaking that you will withdraw opposition to the patenting of our clients' invention, and also withdraw your threatened legal proceedings and right to interfere with the manufacture and sale of our clients' cameras."

On the 16th of May, 1892, the Plaintiffs brought their action under s. 32 of the *Patents Act* of 1883, claiming an injunction to restrain the Defendants from making or continuing threats of legal proceedings or liability by letters, circulars, or otherwise, in respect of the alleged infringement of the letters patent of 1885, of which the Defendants claimed to be the assignees, and for damages.

C. A. 1892

SKINNER & Co. v. SHEW & Co.

On the 1st of July, 1892, the Plaintiffs moved for an injunction in the terms of their claim.

Upon the motion coming on before Mr. Justice *North*, it was stated on behalf of the Defendants that they were desirous of treating the motion as the trial of the action; and it was also admitted by them that they had not brought and did not intend to bring an action for infringement of their patent, and that as proceedings were pending for the amendment of their specification, they were not in a position to bring such an action.

Everitt, Q.C., and *Micklem*, for the Plaintiffs:—

The Defendants' letters are threats within the meaning of sect. 32 of the Act: *Driffield and East Riding Pure Linseed Cake Company* v. *Waterloo Mills Cake and Warehousing Company* (1). No action having been brought by the Defendants to back their threat with due diligence, the Plaintiffs are entitled to an injunction and damages.

Bousfield, Q.C., and *James Roberts*, for the Defendants:—

The letters containing the alleged threats were elicited in answer to questions, and are not threats.

[NORTH, J.:—*Barrett* v. *Day* (2), *Combined Weighing and Advertising Company* v. *Automatic Weighing Machine Company* (3) decided otherwise.]

The communications to the *London Stereoscopic Company* were privileged; there was no other threat.

NORTH, J.:—

I need not trouble you, Mr. *Everitt*. I have to deal with the 32nd section of the Act, and the cases that have been decided upon it. Looking at those cases, it is clear that if the solicitor of a patentee writes to a person whom he believes to be infringing his patent, and threatens him with an action for infringement, that is a threat which the person to whom it is sent has a right to treat as a threat within the 32nd section of the *Patents Act*, and to bring an action to restrain it accordingly. He only does

(1) 31 Ch. D. 638. (2) 43 Ch. D. 435.
(3) 42 Ch. D. 665.

it at some risk, because at the end of the section it is provided that the section shall not apply if the person making such a threat with due diligence commences and prosecutes an action for the infringement of his patent; and it may be that if a person to whom such a letter is sent treats it as a cause of action and brings his action upon it, he may find that his ground of action is cut from under his feet by an action such as was threatened being commenced within a reasonable time. That was the very point that arose in the case of *Combined Weighing and Advertising Company* v. *Automatic Weighing Machine Company* (1), but as a step in deciding that action, the first thing decided was that the letter written was a threat. If it had not been so, the rest of the decision would have been entirely unnecessary. The law has been so settled ever since the case of *Driffield and East Riding Pure Linseed Cake Company* v. *Waterloo Mills Cake and Warehousing Company* (2). I find the law so settled, and I had in consequence in the case of *Barrett* v. *Day* (3) so to hold in respect of a letter which I thought was a perfectly proper letter for a solicitor to write, saying that an action would be brought to restrain the infringement of a patent addressed to the person infringing. I had to hold that that was a letter which did give a right of action, unless the proviso prevented it. [His Lordship stated the facts, and read the correspondence, and proceeded:—]

Down to May no proceedings had been taken by the Defendants, and the Defendants do not ask that the proceedings shall stand over to enable them to bring an action—and the order I make shall recite that they do not ask that the proceedings stand over for that purpose, and that both parties ask me to treat this as the trial of the action, and to give such relief as the Plaintiffs would be entitled to at the trial, and if I think damages could be awarded, to direct an assessment of such damages. In my opinion there is a threat within the section, having regard to the cases which have decided that such letters are threats. That being so, then it follows as matter of course that I must grant the injunction worded in the way I have said,

(1) 42 Ch. D. 665. (2) 31 Ch. D. 638.
(3) 43 Ch. D. 435.

C. A. 1892 SKINNER & Co. v. SHEW & Co. North, J.

and I must refer it to Chambers to inquire whether the Plaintiffs sustained any and what damage by reason of the threat.

The point was set up particularly by the Defendants that an answer to a question cannot be a threat. I do not see why not; I cannot see what difference it makes, whether the threat is made in answer to a question or otherwise. It was a threat that was uttered by the Defendants to the *London Stereoscopic Company* to deter them from dealing with the Plaintiffs, and that being so, the fact that it was only given in answer to a question seems to me immaterial. I cannot see that it could make any difference whether the Defendants were answering the question of the *Stereoscopic Company*, or whether their own letter had been elicited, not by a letter to them, but by an exhibition in the windows of the *Stereoscopic Company* of a model of the camera in question.

D. P.

C. A.

The Defendants appealed. The appeal was heard on the 21st of November, 1892.

Bousfield, Q.C., and *T. Terrell*, for the Appellants, contended, as in the Court below (1.) that the letters in question, being *bonâ fide* answers to inquiries, were not "threats" at all; and (2.) that such letters were privileged communications; and they cited *Wren* v. *Weild* (1) and *Halsey* v. *Brotherhood* (2) as cases upon the old law with reference to allegations of infringement and threats of legal proceedings. They then continued:—

But if these letters are "threats" in the natural sense of the word, they are not "threats" within the meaning of that word in the 32nd section. For the threats in respect of which an action can be brought under that section must be (*a*) "by circulars, advertisements, or otherwise." Here the threats, if any, were certainly not by "circulars" or "advertisements," and the words "or otherwise" must be restricted as referring to methods of threat *ejusdem generis* with "circulars or advertisements," which a letter is not. Again, the threats by "circulars, advertisements, or otherwise," must be in respect of some

(1) Law Rep. 4 Q. B. 730. (2) 15 Ch. D. 514.

"alleged manufacture, use, sale, or purchase of the invention." This points to a course of conduct attended by publicity, and there was nothing of the kind here. There was, in fact, a duty cast upon us fairly to answer the inquiries of the *Stereoscopic Company*, and of *Skinner & Co.*, and we did so. Our answers were invited by, and drawn from us on the initiative of the persons to whom the alleged threats were made. The mischief at which the enactment was directed was *mala fides*, and it could not have been the intention of the Legislature to prevent a patentee from adopting a fair and reasonable line of conduct: *Barrett* v. *Day* (1); *Burnett* v. *Tak* (2); *Dwarris* on Statutes (3).

Moulton, Q.C., and *Micklem*, for the Respondents, were not called upon.

LINDLEY, L.J. (after stating the facts of the case, continued):—

Mr. Justice *North* has held that those letters of the Defendants are "threats" within the meaning of the expression in the 32nd section of the statute of 1883; and, first of all, we must look closely at the section. Supposing they are such "threats," then the person threatened, that is, the present Plaintiffs, or "any person or persons aggrieved thereby may bring an action against him" (the person making the threat), "and may obtain an injunction against the continuance of such threats, and may recover such damage" as may have been sustained thereby. But that enactment is subject to two qualifications; the first is, that the plaintiff may recover "if the alleged manufacture, use, sale, or purchase to which the threats related was not in fact an infringement of any legal rights of the person making such threats." Now, it is admitted here by Mr. *Bousfield* that the Plaintiffs' camera cannot be regarded by him as, in fact, an infringement of the Defendants' legal rights. That is explained by the state of the Defendants' patent, and the necessity for amendment of their specification. Therefore, that condition is complied with. Then there is this further proviso: "that this section shall not apply"—that is to say, an action shall not lie

(1) 43 Ch. D. 435, 444. (2) 45 L. T. (N.S.) 743.
(3) Page 621.

C. A. 1892 SKINNER & Co. v. SHEW & Co. Lindley, L.J.

under this section—"if the person making such threats with due diligence commences and prosecutes an action for infringement of his patent." For the same reason, namely, that the Defendants' specification is not in a fit and proper state, and that an amendment of it is desirable, Mr. *Bousfield* also admits that, as a fact, the Defendants are not in a position to commence and prosecute an action for the infringement of their patent. Therefore, both these conditions may be regarded as complied with, and we need not trouble ourselves further about them. But the last proviso contains, I think, the key to the legislation. I make that observation because we all know, as a matter of history that this section in the *Patents Act* was introduced into the Act, partly in consequence of the decision of the Court in *Halsey* v. *Brotherhood* (1). The headnote to that case, which is sufficient for my present purpose, is as follows: "A patent, so long as it subsists, is *primâ facie* good, and therefore a patentee who issues notices against purchasing from a vendor alleging infringement of his patent is not bound to follow up his notices by taking legal proceedings; and, provided he issues the notices *bonâ fide* in assertion of what he believes, though erroneously, to be his legal rights under his patent, he does not render himself liable to an action by the vendor for damages for injury caused by issuing them: though he may be liable, notwithstanding his *bona fides*, to be restrained by injunction from continuing to issue the notices, if it is proved in the action for an injunction that his allegation of infringement is untrue."

Now the object of this enactment was to cure two blots—first of all, to give an action for damages where there was not one before, and secondly to enable an action to be brought against a man who uses these threats unless he will, or does follow up his threat by commencing an action himself. That is the key note. Now, bearing in mind the state of the law which preceded this enactment, let us look to see what it is. The observations which I have made throw a good deal of light on the word "otherwise," to which I will presently refer more at length. The object of this section is, I think, apparent when once you bear in mind what I have already pointed out, and the object is this: you are not

(1) 15 Ch. D. 514.

to threaten, even in a general kind of way, which might not be regarded as a threat to any particular person; you are not to do it, even by a circular or advertisement; but, if you do threaten, no action is to lie against you if you will prosecute the person who is aimed at by your threats. That is the substance of it. Now, I will read the 32nd section. "Where any person claiming to be the patentee of any invention, by circulars advertisements or otherwise threatens any other person with any legal proceedings." Now, stopping there, Mr. *Bousfield* has urged upon us that, although the letters to which I have referred may be regarded as "threats" they are not threats "by circulars, advertisements or otherwise," if you read "otherwise," as he says you ought, *ejusdem generis*, with "circulars or advertisements;" that is to say, by some published notice in some public way more or less like a circular or an advertisement. But if you so read it, you miss, as it strikes me, the substance of the section—that is to say, you allow a man to make all sorts of threats, provided he does not make them by circular or advertisement, or by some method like a circular or advertisement. The object of the section is to prevent threats, even, as I say, in a general way by circular or advertisement which might or might not be construed or regarded as a threat. The proviso shews that if you do it, you are not liable, provided you bring an action. This construction has been put on this section before. It was the construction put upon it in *Driffield and East Riding Pure Linseed Cake Company* v. *Waterloo Mills Cake and Warehousing Company* (1), it was the construction put upon it in *Combined Weighing and Advertising Company* v. *Automatic Weighing Machine Company* (2), and it was the construction put upon it in *Barrett* v. *Day* (3)—cases before three different Judges, the first being a decision of Vice-Chancellor *Bacon*, the second a decision of Mr. Justice *Kekewich*, and the third a decision of Mr. Justice *North*, all of whom adopted the view that a threat by a letter is sufficient, although you cannot call a mere letter *ejusdem generis* with an advertisement or a circular. My own opinion is that that construction is the correct one.

(1) 31 Ch. D. 638. (2) 42 Ch. D. 665.
(3) 43 Ch. D. 435.

C. A. 1892 SKINNER & Co. v. SHEW & Co. Lindley, L.J.

Then we are urged to say that a letter which is in answer to a question is privileged. It appears to me that the question of privilege is far away from the subject of this inquiry. There is nothing in the nature of privilege in this matter, either at common law or under the statute, and certainly not under the statute. There is nothing in the language of the 32nd section which invites or allows the consideration of such a question as privilege. I think, therefore, the decision of Mr. Justice *North* in this case is right. As to those letters being threats, there is no doubt at all about it—the only doubt is whether they are threats within the true meaning of the word "otherwise." This appeal must be dismissed.

BOWEN, L.J. :—

I am of the same opinion. An inquiry into the state of the law before the statute was passed will enable us to see what the statute meant. At Common Law there was a cause of action whenever one person did damage to another wilfully and intentionally, and without just cause or excuse. Under the head of that class of action came the action of slander of title, whether the subject of the slander was real or personal property. If a man falsely and maliciously—because the malice would shew there was no just cause—made a statement about the property of another which was calculated to do, and which did do, damage to the other in the management of that property, an action woul lie at Common Law, and damages would be recoverable; and in Chancery, I suppose that even if you could not prove that actual damage had occurred, the Court might, if actual damage was likely to occur, prevent the wrongful act by injunction. The cases on the Chancery side and on the Common Law side which occurred before the Act, and which make it clear what the state of the law was, are *Halsey* v. *Brotherhood* (1), on the Chancery side, and *Wren* v. *Weild* (2), on the Common Law side. The law is laid down in an unmistakeable manner. Nor does it require elaboration to shew that, if I make a mis-statement falsely and maliciously about the property of another which does him damage, the Common Law would take cognisance of

(1) 15 Ch. D. 514. (2) Law Rep. 4 Q. B. 730.

such an action. It is to be observed, that in order to make good such a cause of action at Common Law, or to make good such an application for interference by a Court of Equity, you must shew that the statement was false and malicious, a wilful act done without just cause or excuse. And in the case of a person putting forward in the maintenance of what he conceived to be his rights, a false statement which was not in itself defamatory believing it to be true, even if the statement did damage to another person, an action would not lie at Common Law, and the Court of Equity would not interfere. Why? Because he would be acting upon his rights in putting forward his own case. The law would not accordingly interfere, and a threat about an infringement, or alleged infringement, could not therefore be made the subject of an action or a suit unless the plaintiff was prepared to shew that it was made *mala fide*, and that there was no reasonable excuse for it. But it is to be observed that such a state of the law threw an *onus* on those who were in fact aggrieved, which made almost nugatory the remedy in a case of assertions of patent right, the effect of which was to paralyse the trade of others. Because it would be extremely difficult to prove that the persons complained of had put forward these assertions of patent right maliciously, or without just cause or excuse. And apparently the Legislature were of opinion that there was a mischief which was not touched by the Common Law and which they should cure. Then came the statute, and we must see by the section itself what the mischief was and how far the section has cured it. The whole argument of Mr. *Bousfield* and Mr. *Terrell* depends upon their convincing the Court that this particular threat is not a "threat" (within the meaning of sect. 32), "by circulars, advertisements, or otherwise." They say, first of all, that these letters are not threats because they are addressed, in answer to inquiries—one of them to a third party, and the other to the particular person who is supposed to be infringing the patent. But using language in its ordinary sense, it is difficult to see that an intimation ceases to be a threat because it is addressed to a third person in answer to an inquiry, or because it is addressed to the supposed infringer himself. We are not dealing with libel or questions of publication

C. A. 1892 SKINNER & Co. v. SHEW & Co. Bowen, L.J.

—we are dealing with threats. If I threaten a man that I will bring an action against him I threaten him none the less because I address that intimation to himself, and I threaten him none the less because I address the intimation to a third person. Mr. *Bousfield's* argument (as it seems to me that with his usual quickness and perception, he understood) depends on his being able to convince the Court that this is not a threat "by circular, advertisement, or otherwise." The word "otherwise," he says, ought to be cut down and considered according to the rule which is shortly described as the rule of *ejusdem generis*; that it follows upon "circular or advertisement," and that you must construe "otherwise" in such a sense as to confine it to the class or the genus of the circulars or advertisements which it follows. There is no doubt of the existence of the rule of *ejusdem generis*, and it cannot be denied that general words ought to be construed with reference to the words which are immediately around them. But there is an exception to that rule (if it be a rule and not a maxim of common sense), which is that although the words immediately around and before the general words, are words which are *primâ facie* confined, yet if you can see from a wider inspection of the scope of the legislation that the general words, notwithstanding that they follow particular words, are nevertheless to be construed generally, you must give effect to the intention of the Legislature as gathered from the entire section. Here the question is whether the entire section, when you have regard to the special subject-matter to which it is applied, does not lead you to the view that the larger meaning must be put upon the words "or otherwise," and that they rather extend the words which precede them than are themselves confined by them. What is the subject-matter in the first part of this section? It is a threat about a patent action. Now, every person of common sense knows what is involved in patent actions and what the expense of them is, and everybody knows that to be threatened with a patent action is about as disagreeable a thing as can happen to a man in business, and is the thing most calculated to paralyse a man in his business, even if he be innocent of any infringement of patent law. To say that the threat which the

Legislature intends to stop is only such a threat as is directed generally to the public by circulars and advertisements, would be to make the protection incommensurate with the evil; because a man might, by addressing a threat at a particular moment to a purchaser, do as irretrievable damage to the manufacturer whose manufacture was about to be purchased as if he had put his threat in the *Times* newspaper. Take the language of the section, and see if it does not run in the same direction. First of all an injunction may be obtained against a continuance of such threats, language which seems to indicate that it is the hanging of the threat over the head of the person threatened which the Legislature intends to put an end to. Then when we come to the last paragraph, it says: "Provided that this section shall not apply if the person making such threats with due diligence commences and prosecutes an action for infringement of his patent." The whole meaning of the section seems to me to leap into light. The Legislature desires that threats of patent actions shall not hang over a man's head—that the sword of Damocles, in such a case, should either not be suspended, or should fall at once; and it is with that view that the section seems to be framed. If you read the section in that light, it seems to me that the words "or otherwise" cannot be construed in the narrow way in which Mr. *Bousfield* desires them to be construed, nor indeed can I imagine that the Act of Parliament would, in dealing with such an obvious mischief, give a remedy so incommensurate. And although I agree that one should not seek out a mischief in order to extend the remedy, yet if the mischief is obvious, and apt words are to be found in the section, nothing is plainer than that you ought to expound an Act of Parliament so as to deal with the whole mischief which is disclosed. What is the explanation of the insertion of the words "circulars or advertisements"? I think it is rather to enlarge the words "or otherwise," than to cut them down. It might well be doubted whether a threat which was not addressed to a particular person, or to a particular customer, could be said to be a threat if it was couched in the general form of an advertisement issued to the world, or a circular issued to the trade. It might be said that it was not a threat at all. "I am only

C. A. 1892 SKINNER & Co. v. SHEW & Co. Bowen, L.J.

informing the world"—the Defendant might have argued—"as to the way in which I intend to do my business." The statute says circulars and advertisements nevertheless may contain threats, and uses those words "or otherwise" so as to sweep into its net every kind of threat, the result of which might be to paralyse a man in his trade by having an action on a patent suspended before his eyes, without the opportunity of determining the suspense at once and bringing the question raised by his antagonist to a speedy and immediate issue.

On these grounds, it seems to me that the decisions of Vice-Chancellor *Bacon* and Mr. Justice *Kekewich* are right in the cases which my learned Brother has cited, and that Mr. Justice *North*, in following them in the case of *Barrett* v. *Day* (1), and in this case, was really doing what was just.

A. L. SMITH, L.J.:—

I am of the same opinion. I will add a few words as to what in my view is the short reading of this 32nd section, because it is upon it that the whole of this case turns. Having heard the able arguments which have been addressed to us, I have arrived at the conclusion that this section imposes an absolute prohibition against a person threatening unless the threatener can bring himself within either of the two saving clauses at the end of the section. My reading of the section is that a man shall not threaten legal proceedings unless the manufacture to which the threat applies infringes the legal right of the threatener, or unless the threatener is about to forthwith bring an action to shew the validity of his threats. If he cannot bring himself within either of those two, what I call saving clauses, then the section absolutely forbids a man threatening legal proceedings with regard to a patent action at all; and in my opinion, it is *nihil ad rem* to say that what he did was *bonâ fide*, or that what he did was on a privileged occasion, because the section enacts that a man shall not threaten unless he comes within either of the two provisoes at the end of the section.

Then we were pressed with the words "circulars, advertisements, or otherwise," and I think Mr. *Bousfield's* argument about

(1) 43 Ch. D. 435.

C. A. 1892 SKINNER & Co. v. SHEW & Co. A. L. Smith, L.J.

the words "or otherwise" being confined to circulars or advertisements or such like was a taking one, and at first it took me. But when once the conclusion is arrived at that this section imposes an absolute prohibition against threatening legal proceedings at all, unless the threatener comes within one of the two provisoes, I agree with what has been said by my Brothers who have preceded me. Instead of the words "or otherwise" being words which should be cut down to "circulars, or advertisements, or similar methods," they are words to which an enlarging effect should be given, so as to increase the methods by which an actionable threat can be made. If the Legislature had not inserted in this section the words "or otherwise," it might have been argued that a threat to a third person by a letter was not a threat within the section, and this would have nullified its effect. In my judgment my Brothers *North* and *Kekewich* were right, and Vice-Chancellor *Bacon* was also right; and I agree that this appeal ought to be dismissed.

Solicitors: *Watkins, Baylis & Co.; Waterhouse, Winterbotham, & Harrison,* agents for *Cozens-Hardy & Jewson, Norwich.*

W. W. K.

RUABON BRICK AND TERRA COTTA COMPANY *v.* GREAT WESTERN RAILWAY COMPANY.

C. A. 1892 KEKEWICH J. *Nov.* 9. C. A. *Dec.* 5, 6.

[1892 R. 1878.]

Railways Clauses Consolidation Act, 1845 (8 & 9 *Vict.* c. 20), ss. 77, 78, 79 [*Revised Ed. Statutes, vol. ix., pp.* 726, 727]—*Minerals—Open Workings.*

A railway, which was subject to the provisions of the *Railways Clauses Consolidation Act,* 1845, passed over a bed of valuable clay, the manner of working which in the district was by open quarrying. The owner, who had sold the land to the company reserving mines, gave notice to the railway company of his intention to work the clay, and the company did not purchase it:—

Held (affirming the decision of *Kekewich,* J.), that the owner was entitled to work the clay from the surface, and for that purpose to enter upon the land conveyed by him to the company, and to remove the ballast and surface soil lying above such clay.

In 1888 the Plaintiff company purchased an estate at *Ruabon* with a view to manufacturing articles of a peculiar kind of clay

C. A. 1892 RUABON BRICK AND TERRA COTTA COMPANY v. GREAT WESTERN RAILWAY CO.

found in it. Through this estate ran a railway which had been made by private adventure, and of which, so far as it went over this property, the *Great Western Railway Company* were tenants to the owners of the estate. In 1889 the *Great Western Railway Company* promoted a bill to authorize them, *inter alia*, to purchase this railway compulsorily. The Plaintiffs opposed the bill; but the opposition was withdrawn on an agreement, dated the 10th of August, 1889, being entered into between them and the *Great Western Railway Company*. Clause 3 provided that if the bill should be passed the railway company should, on or before the 13th of September, 1889, serve on the Plaintiffs notice to treat, in pursuance of the *Lands Clauses Consolidation Act*, 1845, for a portion of the estate shewn on a plan annexed to the agreement, being the portion occupied by the railway. 4. That notwithstanding anything contained in the Act when obtained, the railway company should be entitled to purchase from the *Ruabon Company* under their compulsory powers only the land shewn on the plan.

"11. In the event of the *Ruabon Company*, in pursuance of the powers reserved by the *Railways Clauses Consolidation Act*, 1845, working the minerals lying under or within forty yards of the said railway, the railway company shall be entitled, as and when such minerals are worked out and removed, to enter into and upon the mines so worked, for the purpose of constructing and to construct such and so many pillars or columns, and whether of brick, stone, or other material, as in the opinion of the engineer for the time being of the railway company may be necessary to protect the said railway and works, but so that the railway company in constructing such works do not interfere with the working of the said minerals in accordance with the provisions of the said statute. Provided that nothing herein contained shall interfere with or affect the right of the *Ruabon Company* to compensation for minerals as provided by the said statute, or for any interference with the free working or getting of same."

The Act was passed, and the railway company gave the *Ruabon Company* notice to treat for the above land. The purchase-money was fixed by arbitration at £7497, the award expressly excluding the value of the clay used by the *Ruabon Company* in

their manufacture, for the reason that such clay was a mineral within the meaning of the *Railways Clauses Consolidation Act*.

By indenture dated the 30th of December, 1890, the *Ruabon Company* and their mortgagees granted the land in question to the railway company in fee, "except and reserved out of the assurance hereby made the mines and minerals under the said hereditaments and premises, and including in such exception the material used by the *Ruabon Company*, and referred to in the hereinbefore recited award."

On the 18th of January, 1892, the Plaintiffs gave notice to the railway company, under sect. 79 of the *Railways Clauses Consolidation Act*, of their intention to work the clay lying under and within forty yards of the railway.

It appeared that the clay came up nearly to the surface of the land, being only covered by a layer of surface soil, varying from three to eight feet in thickness. The custom in the district, where there were various works of the same description as that of the Plaintiffs, was to get the clay by open quarrying, and not by underground workings. The course of practice was in the first place to remove the surface soil over a considerable space, so as to avoid the mixing any of it with the clay, and then to dig out the clay.

The Plaintiff company in the first place laid bare the clay up to the boundary of the railway, and then proceeded to quarry it to a depth of twenty-five feet or more. Finding that they were inconvenienced by the falling in of surface soil and ballast from the land of the railway company, they laid a tramway for the purpose of carrying it away. This tramway was partly on the land of the *Ruabon Company* and partly on that of the railway company. The railway company removed the trams. At the end of September the *Ruabon Company* laid a tramway mainly on their own land, but running into the Defendants' land, for the purpose of removing the surface soil and ballast on the land of the Defendants immediately adjoining the quarry. The Defendants tore up such of the tram rails as were on their land, raised a hoarding between their land and that of the Plaintiffs, and replaced ballast upon that part of their own land which had been cleared by the Plaintiffs. It was not alleged that the

C. A. 1892

RUABON BRICK AND TERRA COTTA COMPANY v. GREAT WESTERN RAILWAY CO.

Plaintiffs had done anything more than was necessary for the advantageous digging of the clay according to the practice of the neighbourhood.

The Plaintiffs brought their action to restrain the Defendants from interfering with the Plaintiffs in getting the clay from under the railway or other property of the Defendants, or in removing the surface soil or other substance lying above the same, and from removing the tram rails laid down by the Plaintiffs for the purpose of removing such surface soil or other substance, or for getting such clay. The Plaintiffs also asked for damages.

The Plaintiffs gave notice of motion for injunction, and it was arranged that the motion should be treated as the trial.

The motion was heard before Mr. Justice *Kekewich* on the 9th of November, 1892.

Warmington, Q.C., *Hopkinson*, Q.C., and *F. Dodd*, for the Plaintiffs:—

The evidence shews that working these mines of clay by excavations in the surface is a proper and necessary manner of working them, "and according to the usual manner of working such mines in the district," within sect. 79 of the *Railways Clauses Consolidation Act*, 1845 (8 & 9 Vict. c. 20). The mines having been excepted out of our conveyance, and the company having neglected to avail themselves of the opportunity of purchasing them under sect. 78, they cannot now prevent us from utilizing what is our own property, and getting this clay in the manner in which it is usually worked in the district—that is, by excavations in the surface. The convenience of the railway company has nothing to do with the mine-owner's rights; the existence of the railway is an accident which does not affect us in the least. We are entitled, under sect. 79, to work exactly to the same extent as if there had been no railway at all and no conveyance, for the company can claim no right of support: *Great Western Railway Company* v. *Bennett* (1). "Mines and minerals," under sects. 77 and 78, include minerals worked according to the custom of the district by open or surface workings: *Midland Railway Company* v. *Robinson* (2).

(1) Law Rep. 2 H. L. 27, 40. (2) 15 App. Cas. 19.

Cripps, Q.C., and *Medd*, for the Defendants:—

We do not deny that the clay is the property of the Plaintiffs, nor their right to work it even to the extent of letting down our line and up to our boundary; but we contend that they cannot, by what Mr. Justice *Kay* has, in *Midland Railway Company* v. *Haunchwood Brick and Tile Company* (1), called an "ingenious distortion" of the provision in sect. 79 of the *Railways Clauses Act*, trespass upon our surface by working across our boundary, taking away our ballast, and taking up the sleepers and rails on which we carry our traffic. The power of the railway company to acquire the clay within the time limited for the exercise of their statutory powers, if deemed advisable for the support of their line, is not taken away by sect. 77 and the following sections: *Errington* v. *Metropolitan District Railway Company* (2). The relations between the parties and also the agreement that was entered into make it clear that our line was not to be interfered with by the Plaintiffs in working their clay. Sect. 79 only enables the mine-owners to work, as therein mentioned, so far as they can do so without interfering with the vested rights of any one else. They must work subject to the existing rights of the railway company. What, then, is the right of the railway company? The mines belong to the mine-owner, because they are excepted out of the grant to the railway company; but what is not excepted out of such grant is the actual property of the company, placed on the surface—that is to say, their ballast and line of rails. Under sect. 77 mines are excepted out of the conveyance of the surface to the railway company, and it has been held that the company are not entitled to subjacent or adjacent support, and that, therefore, the mine-owner may let down the surface because he is only working according to the rights reserved to him. But here the Plaintiffs, the mine-owners, desire to cause injury to us by invading our property and taking away our fences and ballast—that is to say, they are working their mines inconsistently with the right vested in us. If they want to work the clay under our line, they must do so by working from the side and excavating without trespassing on

(1) 20 Ch. D. 552, 560. (2) 19 Ch. D. 559, 571-2.

C. A. 1892

RUABON BRICK AND TERRA COTTA COMPANY v. GREAT WESTERN RAILWAY CO.

our property at all: *Midland Railway Company* v. *Haunchwood Brick and Tile Company* (1).

Provisions in an Act of Parliament as to the mode of working minerals ought not to be read as applying to the rights of the owner of the surface: *Davis* v. *Treharne* (2). There is nothing in *Midland Railway Company* v. *Haunchwood Brick and Tile Company* which is inconsistent with our argument. That case turned solely on the meaning of the word "mines" in sect. 77 of the Act of 1845 (8 & 9 Vict. c. 20). So in *Great Western Railway Company* v. *Bennett* (3) and *Midland Railway Company* v. *Robinson* (4), the question was as to the right to work at all, and the decision in the last-mentioned case went solely on the point that the limestone which it was sought to get was a mineral within sects. 77 and 78. None of those cases dealt with the distinction which exists between a claim to work mines *simpliciter* and a claim to come upon the surface and work them so as to interfere with the vested rights of the railway company, and to the destruction of their railway. On the other hand, in *Pountney* v. *Clayton* (5), *Brett*, M.R. (6), said: "Therefore, even where the mines are to be deemed excepted out of the conveyance to the railway company, any one who by digging the land and not by the operation of mining, were to let down the surface on which was the railway, would be a trespasser, as he would be digging on the land of the railway company," and that is quoted with approval by Lord *Macnaghten* in *Midland Railway Company* v. *Robinson* (7), and he expressly says that, although a railway company is not entitled to support from the minerals under their line, it does not follow that the mine-owner is entitled to enter upon the surface, which unquestionably belongs to the railway company, and break it up by working from the surface. In *Midland Railway Company* v. *Miles* (8) the decision in *Great Western Railway Company* v. *Bennett* was carefully considered by Mr. Justice *Stirling*, and he points out that the mine-owner in order to work the minerals from the surface must get "lawfully

(1) 20 Ch. D. 552, 560–1.
(2) 6 App. Cas. 460.
(3) Law Rep. 2 H. L. 27.
(4) 15 App. Cas. 19.
(5) 11 Q. B. D. 820.
(6) Ibid. 833.
(7) 15 App. Cas. 24, 36.
(8) 33 Ch. D. 632.

and properly " on the land, shewing that some statutory provision is required enabling him to get lawfully to the surface.

The matter, therefore, is *res integra*, and having regard to the amount of the purchase-money given by the railway company for the purchase of an existing line which had been worked for thirty years, it is impossible to suppose that it was the intention or in the contemplation of the parties that it should be open to the vendor to destroy the railway immediately after he had sold the land.

Warmington, in reply :—

The Plaintiffs rest their case on *Great Western Railway Company* v. *Bennett* (1). The decision of the House of Lords establishes the law that under the *Railways Clauses Acts* the mine-owner has an absolute right to work his mines according to the usual manner of working in the district, and that there is no limitation of that right, except this, that he must exercise it with a view to the beneficial working of the mines and not maliciously for the purpose of injuring the railway company. The law as so laid down is accepted by Mr. Justice *Stirling* in *Midland Railway Company* v. *Miles* (2), and recognised by Lord *Herschell* in *Midland Railway Company* v. *Robinson* (3). The words of *Brett*, M.R., cited from *Pountney* v. *Clayton* (4), are a mere *dictum*, which no doubt derives weight from the apparent approval of Lord *Macnaghten* (differing from the judgment of the other Lords) in *Midland Railway Company* v. *Robinson*, but neither that *dictum* nor the *dictum* of Lord *Macnaghten* himself (5) can avail against the direct authority of *Great Western Railway Company* v. *Bennett*.

KEKEWICH, J. :—

It has been argued that the precise point which I am now called upon to decide has not been decided in any previous case; and if that were so I should take some time to consider my judgment, because it obviously is a question of vast importance,

(1) Law Rep. 2 H. L. 27.
(2) 33 Ch. D. 632.
(3) 15 App. Cas. 19.
(4) 11 Q. B. D. 820.
(5) 15 App. Cas. 36.

C. A. 1892 — RUABON BRICK AND TERRA COTTA COMPANY v. GREAT WESTERN RAILWAY CO. — Kekewich, J.

not only to the parties engaged in this particular litigation, but to all who are concerned with minerals under railways, or other like communications—that is to say, not only to the railway companies, or canal companies, or tramway companies, but also to landowners who have parted with their interests to those companies. But in my view the question has been disposed of, and I really have only to apply former decisions to the present case. What is said to be the novelty is this. It is admitted on behalf of the Defendants, the *Great Western Railway Company*, that the landowner, who has sold one of the vertical strata of his land, using Sir *George Jessel's* expression in *Eardley* v. *Granville* (1), and has reserved one stratum, as, for instance, a stratum of clay, either by the express words of his conveyance, or by the application to it of the words of the *Railways Clauses Consolidation Act*, may work that clay as he pleases, so long as he does it in a proper manner, and notwithstanding that the necessary natural and physical result of that working is to let down the railway. But it is said, for that purpose he must get at this stratum as he best can. His rights are said to be defined by the law which is stated by Sir *George Jessel* in the case to which I have just referred (2): "The freeholder retains the mineral stratum as part of his ownership; and whether or not he takes the minerals or subsoil out of the stratum, the stratum still belongs to him as part of the vertical section of the land." He can abstract the contents of that physical area in any way he pleases, and in any way that is possible, if he can only manage to do it without trespassing upon any other person's land. With the consequences, when he has done it, he is not in the least concerned. That is common ground.

But in this case, as in many others, the question arises respecting a mineral (for it has not been doubted and could not be doubted that the clay in question is a mineral within the meaning of the Act), which can only be got at by means of surface workings, as was described again by Sir *George Jessel* in his judgment in the case of *Errington* v. *Metropolitan District Railway Company* (3). The railway company now say, "Work that

(1) 3 Ch. D. 826, 834. (2) 3 Ch. D. 834.

(3) 19 Ch. D. 571.

clay if you can, but you have no right to come upon our land; you have conveyed the surface to us, and we have used it for the purposes of our railway, for which the conveyance was intended to enure, and which must have been in the contemplation of the parties, and it cannot be that you are now entitled to break down a hedge, to come upon the line, take up the ballast which we have laid down, and remove the sleepers with all their chairs and other fixings, and the permanent way which rests upon the whole—that is, in short, a trespass. That is not using your property, but using ours; and though you are entitled to use your own property, irrespective of consequences, you are not entitled to use or take ours." That is the position. Dealing, as we are, with a railway company, there is no occasion to consider what is implied in the reservation of the minerals, or of this particular mineral, because the rights of the railway company on the one hand, and the landowner on the other, are all defined by the *Railways Clauses Consolidation Act*, 1845, and by that *fasciculus* of clauses which commences with sect. 77. The one on which the present question mainly depends is sect. 79. The landowner, who has reserved a vertical stratum of this kind—again I say, either by not mentioning it in the conveyance so as to make the Act apply, or by express words, or as very frequently happens by both means—the landowner is entitled to work his mines, after certain notices and so forth, "in any manner proper and necessary for the beneficial working thereof, and according to the usual manner of working such mines in the district where the same shall be situate." It has not been denied that according to the usual manner of working in the district in which this clay is situate, it ought to be worked from the surface, and that has not really been argued before me. The judgment to which I have already referred in *Errington* v. *Metropolitan District Railway Company* (1) would dispose of anything but a substantial argument supported by substantial evidence to the contrary. Therefore, if they are to work it according to the custom of the country, and according to the usual manner of working, they must work it from the surface. That does not mean that they must not work it in any other

(1) 19 Ch. D. 559.

C. A.
1892
RUABON BRICK AND TERRA COTTA COMPANY v. GREAT WESTERN RAILWAY CO.
Kekewich, J.

way, and probably what was said by Mr. Justice *Kay* in *Midland Railway Company* v. *Haunchwood Brick and Tile Company* (1), would be an answer to any contention of that kind. But the landowner says: "This being the proper manner and mode of working, I am entitled to work in that manner, though possibly I might also be entitled to work in some other way." That question he does not desire to raise; therefore, it comes to this, it being either conceded or proved that that is the ordinary way of working, and that it would be a departure from the ordinary manner of working to approach the clay from underground, is the landowner entitled to do what he claims to be entitled to do, namely, come upon the surface? If he may come upon the surface to work, if he is entitled to work upon the surface, I think all the rest follows. I need not pause to inquire whether he may break down the hedge, or whether he may remove the sleepers, and so forth, because all that is subordinate. All that character of work would be incidental to working from the surface; and though he would of course be liable in damages by way of compensation if he did not do all that was right and reasonable for the protection of the railway company, his right in those matters of detail would be governed, not merely by the reservation in the Act of Parliament but by the ordinary law, which implies in any right granted by reservation or otherwise whatever is necessary to give that right full effect. I repeat, it is said on one side that this is a new point; it is said on the other side that it depends entirely upon the Act of Parliament. I intend to dispose of it on the footing of its not being a new point, and I intend that anything I say about it shall rest on authority, and on authority only, leaving it open, if it is open, to be argued elsewhere at any time, in this or in any other case, that what I consider to be decided was wrongly decided, without any fetter, if my decision could be one, from any decision of mine.

The point certainly arose in the minds of the noble Lords who took part in the case of *Great Western Railway Company* v. *Bennett* (2). I say it arose in their minds because their language shews it. It may be argued, and I express no definite opinion

(1) 20 Ch. D. 552. (2) Law Rep. 2 H. L. 27.

of my own upon the point, that that case might have been disposed of in the way in which it was disposed of in the House of Lords without any expression of opinion on this particular point, and the statement of the case by Lord *Chelmsford* in moving the judgment of the House points in that direction. He states the case thus (1): "The question to be determined is, whether"—then follows a somewhat long parenthesis—"the plaintiffs in error are entitled to sufficient support to the railway from the portion of the mines and minerals lying under or adjoining the same, without being bound to make compensation to the defendant in error." It may very well be argued that the question could be determined without any expression of opinion on the part of the House, or any members of it, respecting surface rights; that is to say, the right to work from the surface. The integrity of the surface was in question, because the House had to determine whether the surface might properly be let down; but working from the surface does not appear to have been directly in question there. Notwithstanding that, two of the noble Lords did express distinct opinions upon the point: there is the expression of Lord *Chelmsford* himself at the bottom of page 38, and there is the still more distinct expression of Lord *Cranworth* on the top of page 40. Again, it has been argued that on the proper construction of that language, and having regard to the question before the House, what Lord *Cranworth* meant, and, if Lord *Cranworth*, Lord *Chelmsford*, was that the working underground must be independent of the conveyance of the surface, and must be such that the owner of the surface might operate upon it, and the House was not thinking of working through the surface, but only of working underground with reference to the surface. But whether that be a fair construction of their language or not, I say again I express no opinion. Lord *Westbury*, who was the only other party to the judgment, does not appear to me to have used language at all equivalent to Lord *Cranworth's* or Lord *Chelmsford's*. On page 42 he says: "If the company should not think it requisite, the mine-owner is left under no other obligation than that he is to win the mines in a proper manner; and if there is a custom of the country it must be done according to

(1) Law Rep. 2 H. L. 37.

C. A. 1892

RUABON BRICK AND TERRA COTTA COMPANY v. GREAT WESTERN RAILWAY CO.

Kekewich, J.

that custom." But he says nothing about the surface, and the most that can be said about his judgment in favour of the plaintiffs' view is that he was there, and did not dissent from what was said by the others.

Now I have taken care to express no opinion respecting the meaning of the language there used by Lords *Chelmsford* and *Cranworth*, and I have done so for this reason, that the judgments have been considered in other litigations, and have received a construction which I think is quite as much binding upon me as the decision itself. Before going to that, I should wish to deal with a possible authority the other way, and that is the judgment of Lord *Macnaghten* in *Midland Railway Company* v. *Robinson* (1), and the *dictum* of the present Master of the Rolls, to which Lord *Macnaghten* refers. Now, first, as regards *Pountney* v. *Clayton* (2), the *dictum* of the present Master of the Rolls in that case of course derives considerable authority from having been cited by Lord *Macnaghten* in the House of Lords when he called the attention of counsel to it. But certainly, though entitled to the greatest respect as a *dictum*, it was not necessary for the decision of the case which was then before the Court, and I cannot help observing that Lord *Esher* was a party to the decision in *Errington* v. *Metropolitan District Railway Company* (3), and that he entirely concurred in the view taken by Sir *George Jessel* and Lord Justice *Holker*, and that, though again that did not decide this question—though this question was not actually before the Court—there was a very strong expression of opinion on the part of Sir *George Jessel* at the bottom of page 571 and the top of page 572 of 19 Ch. D., where he says: "If that is so, if they do not buy them, the owner after thirty days' notice may break the surface and dig up the gravel and clay," and the whole of his judgment points in that direction, though he upheld the right of the railway company to give a notice to purchase the minerals—there was nothing there but gravel — almost immediately after, or a very short time after, they had purchased the surface, rather indicating a want of value in the minerals to them. He upheld that on the ground that they

(1) 15 App. Cas. 19. (2) 11 Q. B. D. 820, 833.
(3) 19 Ch. D. 559.

could be worked from the surface, and could not be worked in any other way. The Master of the Rolls was a party to that decision, and says not a word by way of dissent from Sir *George Jessel*. That, of course, is not conclusive as to his meaning; and it is quite possible that what he said in *Pountney* v. *Clayton* (1) may be reconciled with that; but still what he said in *Pountney* v. *Clayton*, being only a *dictum*, must be regarded with reference to his concurrence in the other case. But Lord *Macnaghten* not only quotes that, and I think must be taken to have quoted it with approval, but himself expresses an opinion pretty strongly at the end of his judgment. He says (2): "I do not think that it necessarily follows from that circumstance"—that is, the circumstance that a railway company is not entitled to support from adjacent or subjacent mines—"that a mine-owner who is entitled to withdraw support by working his mines in the ordinary course if the company do not compensate him is entitled to enter upon the surface, which unquestionably belongs to the railway company, and break it up by working from the surface." That is a strong expression on the part of Lord *Macnaghten*, and if it were the judgment of the House would be binding upon me, and probably conclude this case, notwithstanding that it is at variance with the earlier case of *Great Western Railway Company* v. *Bennett* (3). But it is not the judgment of the House; it is an expression of opinion by a Lord of Appeal differing from his colleagues. He held that the judgment of the Court below was wrong, and ought to be reversed. His opinion counted for nothing, and it would be an entire departure from authority to say that what he said in the course of his differing judgment can weigh against the judgment itself, or against the authorities which are recognised in it. I certainly treat the judgment of Lord *Herschell* in the same case as pointing to the conclusion, though he does not expressly say it, that the mine-owner may work from the surface. He quotes, with approval, what Lord *Chelmsford* says in *Great Western Railway Company* v. *Bennett*, and though he does not refer to what Lord *Cranworth* said, of course he had the whole case

(1) 11 Q. B. D. 820. (2) 15 App. Cas. 36.
(3) Law Rep. 2 H. L. 27.

C. A. 1892

RUABON BRICK AND TERRA COTTA COMPANY v. GREAT WESTERN RAILWAY CO.

Kekewich, J.

before him, and if he had wished to qualify or modify that, I take it for granted he would have done so. The only other case to which I wish to refer, and it is one which has great influence with me, is *Midland Railway Company* v. *Miles* (1), before Mr. Justice *Stirling*. I am not sure that Mr. Justice *Pearson*, although he granted the injunction in that case, took precisely the same view as Mr. Justice *Stirling* did afterwards at the trial. The injunction was granted, as I gather, rather on the ground of its being more convenient to grant an injunction where there was a serious question to be tried. But Mr. Justice *Stirling* goes into the whole law in a considered judgment, and what I desire to insist on is this—not that he formed an opinion of his own, though I have no doubt he did—not that this is an expression of his own opinion, or view of what the law is on the construction of the 79th section, but that he expresses the result of other cases, and particularly of *Great Western Railway Company* v. *Bennett* (2); and this judgment, delivered more than six years ago, seems to me to exclude from the consideration of this Court any criticism of the language of Lord *Chelmsford* and Lord *Cranworth*, and to make it impossible for me to regard those noble lords as meaning anything other than they said grammatically. I do not pause to read through Mr. Justice *Stirling's* judgment; but he does treat that case as conclusive, and he deals with the argument with reference to Lord *Cranworth's* judgment—which certainly, to my mind, is Mr. *Cripps'* strongest argument, that the landowner cannot work this clay in the manner he proposes without a trespass. That is the short and strong way of putting the case, and with that Mr. Justice *Stirling* deals, and refers to the judgment of Mr. Justice *Kay*, in *Midland Railway Company* v. *Haunchwood Brick and Tile Company* (3), which may or may not be a decision the other way. It requires perhaps a little examination to understand precisely what Mr. Justice *Kay* meant by expressions which he used with reference to the arguments addressed to him and not to the general law.

Therefore, it comes to this, that I have distinct language used

(2) 33 Ch. D. 632. (2) Law Rep. 2 H. L. 27.

(3) 20 Ch. D. 552.

in the House of Lords, possibly capable of an interpretation other than has been given to it in other cases, but construed by other learned Judges whose decisions are binding upon me, and upon the meaning as so construed the Plaintiffs are entitled to what they claim—that is to say, to go upon the land which they have themselves parted with and conveyed, and, within the limits defined by the *Railways Clauses Act* as regards damage and compensation and so forth, to work this clay from the surface.

It follows that if that right be interfered with, which it has been honestly, by the railway company contesting the right, the Plaintiffs are entitled to damages for such interference.

I think the proper course to pursue will be to declare that the Plaintiffs are entitled to work the clay. I suppose some particular words will be easily framed to describe the clay from the surface of the land conveyed by them to the railway company. I doubt whether it is necessary to do any more; but if it would be more convenient, I should not object to go on to say, "and for that purpose also to remove the ballast, sleepers, and permanent way of the railway company."

The order drawn up was as follows:—

Declare, that the Plaintiffs are entitled to work their clay from under the land of the Defendants conveyed by the Plaintiffs to the Defendants by deed dated the 30th of December, 1890, and for that purpose are entitled to enter upon the said land of the Defendants so conveyed as aforesaid, and to remove the ballast, "fey," or surface soil, lying or being above such clay.

Order that the Defendants, their servants, &c., be perpetually restrained from hindering or interfering with the Plaintiffs working their said clay under the land of the Defendants so conveyed as aforesaid or entering the said land or removing the ballast, "fey," or surface soil, lying above such clay for that purpose.

C. C. M. D.

C. A.

The railway company appealed. The appeal came on for hearing on the 5th of December, 1892.

Sir *H. Davey*, Q.C., *Cripps*, Q.C., and *Medd*, for the Appellants:—

We admit that this terra-cotta clay must be treated as a "mineral" within the mineral sections of the *Railways Clauses*

C. A. 1892

RUABON BRICK AND TERRA COTTA COMPANY v. GREAT WESTERN RAILWAY CO.

Act, 1845, and that "the usual manner" of working this particular kind of mineral is from the surface; but we contend that, when the surface has been sold for a statutory purpose, the mine-owner is not entitled to come upon that surface and take it away. The railway company has statutory rights which the *Terra Cotta Company* can only put an end to by clear statutory authority enabling them in that behalf, and there is no statute nor is there any decision which authorizes a mine-owner to commit a trespass. He may quarry and work from underneath until he lets down the surface. If he does that in this case, we must support it in the best way we can. We shall be entitled under the agreement of the 10th of August, 1889, to protect our railway by shoring it up with columns or otherwise. This might be more difficult if it was a main line; but it is a branch line without very much traffic, and our engineers think that it will be possible, so that we do not require the support of the subjacent minerals. But the mine-owner has no right to come upon the permanent way of the railway company and dig it up and take away the company's rails, sleepers, and ballast for the purpose of getting their clay, and laying their own tramway on the company's permanent way.

It is one thing to say that a man may use his own property in such manner as he may think fit, even though he may thereby injure or destroy his neighbour's; but it is quite another to maintain that he may go upon, and use his neighbour's property, and destroy it, for the purpose of benefiting his own; and our contention is that the statute has authorized the one, but not the other.

The learned Judge in the Court below seems to have chiefly relied on the *Great Western Railway Company* v. *Bennett* (1), and there are, no doubt, certain *dicta* in the judgments of Lord *Chelmsford* and Lord *Cranworth* in that case (2) which lend some colour to his decision. But the question in that case was whether the railway company was, like an ordinary purchaser of the surface, entitled to adjacent and subjacent support. The present question was not before the House; no argument had been addressed to the Court upon it, and we submit that the true construction of the *dicta* is only that the mine-owner work-

(1) Law Rep. 2 H. L. 27. (2) Law Rep. 2 H. L. 38, 39, 40.

ing in, and amongst, minerals belonging to himself, is not bound to regard the consequences to the surface any more than he would have been if the surface had belonged to himself; and that it was not in the minds of their Lordships to say that a mine-owner had any right to come on surface he has sold to others and remove a permanent way laid under statutory powers for a statutory purpose.

In *Midland Railway Company* v. *Haunchwood Brick and Tile Company* (1), the question was whether the word "mines" in sect. 77 of the *Railways Clauses Act*, 1845, included minerals got by open workings; and Mr. Justice *Kay* carefully avoided deciding any such question as is now raised; and the inference from his expressions, so far as they go, is that a mine-owner is not entitled to commit a trespass.

Again, in the case of *Errington* v. *Metropolitan District Railway Company* (2), the question was a different one to this, namely, whether a railway company who had taken the surface could serve a second notice to treat in respect of minerals in order to acquire a stratum of gravel under their surface. No argument was addressed to the Court as to the right of the mine-owner to let down from the surface; and it was not necessary to, and the Court did not, decide it.

[BOWEN, L.J.:—If your argument is right, the railway company will have taken away from the mine-owner the best way of working his clay, without making him any compensation for the loss of the facility of which it has deprived him. Do you submit to compensation being awarded under sect. 81 of the *Railways Clauses Act*, 1845?]

We have agreed by the 11th clause of our agreement, that nothing therein contained is to affect the right to compensation provided by the statute; but we do not admit that the mine-owner here is entitled to compensation, for we deny that he will suffer any injury whatever. There are two alternative courses which must be kept distinct. If we find that we require the support of the minerals, we may stop the mine-owner from working altogether—in which case we should have to pay for the minerals.

(1) 20 Ch. D. 552. (2) 19 Ch. D. 559.

C. A. 1892 — RUABON BRICK AND TERRA COTTA COMPANY v. GREAT WESTERN RAILWAY CO.

But we do not require the support of the minerals, and do not want to purchase them: we are content with the horizontal stratum of surface which we have bought. Then, if the mine-owner in continuing his workings finds that he cannot work so freely by reason of his having sold the surface, he may possibly be entitled to some compensation under the 86th section. But he cannot come on the surface which I have bought from him, and on which I have, under statutory powers, constructed a public railway, and take away the stratum he has sold me for the purpose of working the stratum he has retained underneath it. The mineral sections of the Act of 1845 are, no doubt, difficult of construction, and our highest tribunals have differed upon them; for instance, the *dicta* of Lord *Westbury* in *Great Western Railway Company* v. *Bennett* (1), and of Lord *Cairns* in *Smith* v. *Great Western Railway Company* (2), were dissented from by the House of Lords in *Dixon* v. *Caledonian and Glasgow and South Western Railway Companies* (3), where Lord *Selborne* remarks upon the danger of attributing the weight of a decision to a *dictum*. But they contain no enactment which shews that the point now before the Court was within the purview of the Legislature.

The next case referred to by Mr. Justice *Kekewich* is *Midland Railway Company* v. *Miles* (4). There Mr. Justice *Stirling* was dealing with a question with reference to a piece of superfluous land not wanted for the purposes of the railway, which has no analogy to a question regarding the destruction of the surface of a railway as a highway for statutory purposes. Here there is a conflict between two statutory rights which did not exist there. But we submit also that the view which Mr. Justice *Stirling* took of *Great Western Railway Company* v. *Bennett* and of the Act of Parliament was erroneous.

Pountney v. *Clayton* (5) is another case with reference to surplus land; and there is a *dictum* of Lord *Esher* (6), that even in a case where the railway company had not purchased the mines "any one who by digging the land and not by the

(1) Law Rep. 2 H. L. 27.
(2) 3 App. Cas. 165, 182.
(3) 5 App. Cas. 820, 826.
(4) 33 Ch. D. 632.
(5) 11 Q. B. D. 820.
(6) Ibid. 833.

operation of mining, were to let down the surface on which was the railway, would be a trespasser, as he would be digging on the land of the railway company." This is a *dictum* which, so far as it goes, is in our favour. But, in *Midland Railway Company* v. *Robinson* (1), there is a stronger *dictum* in our favour. In that case the question was not one of working, but one of title, namely, whether in the mineral sections of the *Railways Clauses Act*, 1845, the expression "minerals" is or is not confined to such minerals as can be got by underground working. Upon that question Lord *Macnaghten* differed from Lords *Herschell* and *Watson*; and towards the close of his judgment his Lordship delivered the following *dictum* (2): "That a railway company is not entitled to support from subjacent or adjacent mines is perfectly clear from the Act, as was pointed out in *Bennett's Case* (3). But I do not think that it necessarily follows from that circumstance that a mine-owner who is entitled to withdraw support by working his mines in the ordinary course if the company do not compensate him is entitled to enter upon the surface, which unquestionably belongs to the railway company, and break it up by working from the surface."

We submit then that this point is unfettered by authority, and untouched except by *dicta* not amounting to authority, because uttered by Judges whose minds were not directed to the point upon which their *dicta* are now cited. And, this being so, there is nothing in the Act itself which says that a mine-owner may use for the purpose of working his mine the property he has conveyed to a railway company, who are, it may be, bound to keep their railway open as a highway, and at any rate are using it for a statutory purpose. There is nothing in terms to divest all the rights of the surface owner. Nor can any implication to that extent be drawn from sect. 79: that section simply defines a method of working, but gives no rights at all. In this case there is a conflict of statutory rights; and sect. 79 does not give any preference to the statutory right of the mine-owner. Upon principle the surface owner has the right to keep off a trespasser, and the mine-owner must exercise his right of working

(1) 15 App. Cas. 19. (2) 15 App. Cas. 36.
(3) Law Rep. 2 H. L. 27.

C. A. 1892

RUABON BRICK AND TERRA COTTA COMPANY v. GREAT WESTERN RAILWAY CO.

according to the custom, so as not to destroy the statutory rights of the surface owner, or to absolve himself from a legal obligation collateral to the working of the mine: *Davis* v. *Treharne* (1)

[They also referred to *Dalton* v. *Angus* (2) and *Bonomi* v. *Backhouse* (3).]

Hopkinson, Q.C., and *F. Dodd*, for the Respondents:—

It is admitted that we can go on working our clay from underneath until we let the surface soil fall into our quarry; and what practical difference is there to the Appellants between doing that and going on the land in front of our surface, stripping off the surface earth, and taking the clay underneath it? It would be an inconceivable state of things if, where the injury to the railway company would be exactly the same in each case, it would be lawful for us to do the one but not the other. To us it makes all the difference, because our terra-cotta clay requires to be kept absolutely pure as it is being worked, and to let down the surface soil upon it would spoil it for our purpose. So it is necessary for us to strip off the surface. The true and reasonable construction of the 79th section is that it entitles us to get the minerals reserved to us so long as we do what is necessary for getting them in the mode usual and proper for working them beneficially. And this is distinctly our right both on principle and authority. The mineral clauses in the Act of 1845 form a complete code of law defining the rights of the parties where a railway company takes the surface and does not choose to take the minerals, and, according to the authorities, were passed primarily for the benefit of the railway companies, who would otherwise have been obliged, when they had to purchase the surface, at the same time to buy all the valuable minerals underneath. By these clauses they are saved the interest on their purchase-money between the time when they bought the surface and the time when in ordinary course the minerals came to be worked. For, after all, as was said by Lord *Watson* in *Midland Railway Company* v. *Robinson* (4) (which is an express decision in

(1) 6 App. Cas. 460.
(2) Ibid. 740.
(3) E. B. & E. 622, 639.
(4) 15 App. Cas. 34.

our favour), "This is a mere question as to the period of time at which railway companies must acquire and pay for the subjacent and adjacent minerals necessary for the support of their lines." While the railway companies get this benefit, with regard to the landowner, or, rather the mine-owner, it is, according to a line of authority, beginning with the judgments of Lord *Chelmsford* and Lord *Cranworth* in *Great Western Railway Company* v. *Bennett* (1), just as if there had been no dealing with the surface at all. We admit that if we do what is not necessary for the purpose of getting our minerals that would be a trespass, and if it is not necessary for the purpose of winning our clay to remove the rails or sleepers of the company, we shall not do so, and they could prevent us if we tried. For the right of the mine-owner is strictly limited to the purpose of winning. The *dicta* of Lords *Chelmsford* and *Cranworth* have been recognised over and over again in *Midland Railway Company* v. *Haunchwood Brick and Tile Company* (2), *Midland Railway Company* v. *Miles* (3), and other cases. The railway company have up to this time bought and paid for nothing but the surface, without any right to adjacent or subjacent support. But they can purchase our rights whenever they choose. In point of justice, the Respondents clearly are in the right, for the clay was expressly excluded by the arbitrator in valuing the land on the purchase by the railway company. As to convenience, it would be a most absurd state of the law to oblige the owner of the clay to get it by underground workings, which, as a general rule, would be a great loss to him and no advantage to the railway company, for, in either way the surface would be destroyed, The question is dealt with by Lord *Herschell* in *Midland Railway Company* v. *Robinson* (4). The agreement in the present case makes it more advantageous to the railway company that the clay should be got by underground workings; but that does not affect the general question as to the right of the mine-owner to get his minerals in the most advantageous way. The railway company have nothing to do but to pay the mine-owner the fair price of what they are depriving him of. Were it not for sects. 77, 78, 79 in the *Railways*

(1) Law Rep. 2 H. L. 27.
(2) 20 Ch. D. 552.
(3) 33 Ch. D. 632.
(4) 15 App. Cas. 28, 29.

C. A. 1892 RUABON BRICK AND TERRA COTTA COMPANY v. GREAT WESTERN RAILWAY CO.

Clauses Act, the destroying the surface in either way would be an actionable wrong. In the case of underground workings the action would be an action on the case—as to surface workings an action of trespass; but the clauses shew no trace of any distinction between the acts which would give rise to different forms of actions. The language of Lord *Cranworth* in *Great Western Railway Company* v. *Bennett* (1) has been quoted with approbation by Mr. Justice *Kay* and Mr. Justice *Stirling*, and by the present Master of the Rolls in *Pountney* v. *Clayton* (2), and is recognised as law, that the mine-owner, if the company does not purchase, is to be in the same position as if he had never sold the surface. The only passage in the judgment of the Master of the Rolls which appears to make against us is on p. 833, where he says that a person who, by digging the land, and not by mining, lets down the surface, is a trespasser; but that only refers to digging not necessary for the purpose of winning the minerals. We claim no more than a right to carry on our open workings. We do not claim a right to enter on the surface of the land further than that.

Cripps, in reply:—

The railway company get a grant of the surface, with a right to the user of the surface, and the landowner has no right to derogate from that.

[BOWEN, L.J.:—Is that so—do the railway company merely get the surface? Do not they get all the land except the mines? Then sect. 79 enables the mine-owner to let down the surface by working his mines below. How do you draw the distinction?]

Under sects. 77–79, it has been decided that by their conveyance the company do not get the mines nor any right to support from them; therefore, if a mine-owner lets down the surface, he is not interfering with any right vested in the railway company; but a mine-owner who enters on the surface is interfering with a right to the surface which has vested in them. Here the Plaintiffs are claiming a right to remove the

(1) Law Rep. 2 H. L. 27, 40. (2) 11 Q. B. D. 820, 836

ballast which has been put upon the surface for the purpose of supporting our line.

The decision in *Midland Railway Company* v. *Robinson* (1) is quite consistent with the argument of the Appellants, though there are *dicta* which are against us. In that case the mode of working had not been determined upon: the mine-owner was merely proposing to let his mines, and the present point could not arise until a particular mode of working was determined upon.

[BOWEN, L.J.:—It appears to me that the question of right to break up the land was involved, and was presented to the House of Lords: see Mr. *Rigby's* argument (2).]

It was brought before the House as a test of the question which was being discussed, but not as a point they had to decide. Lord *Herschell* seems to treat it as immaterial whether the line was let down from below or was destroyed by surface workings; but in particular cases everything may turn upon the difference; and such is the case here, for the right of the railway company to prop up their line under their agreement makes underground workings a matter of no very serious importance to them.

LINDLEY, L.J.:—

This case raises an important question which has come before the Court, I will not say for the first time, but the importance of it is now realized more vividly than it has been before.

The appeal is from an order made by Mr. Justice *Kekewich*, in an action brought by the *Ruabon Brick Company* against the *Great Western Railway Company*, to restrain the *Great Western Railway Company* from interfering with what I may shortly call the surface mode of working by the Plaintiffs of their clay pits, and the learned Judge upon an interlocutory motion, which was treated by consent as the trial of the action, made an order declaring that the Plaintiffs, the clay company, "are entitled to work their clay from under the land of the Defendants, conveyed by the Plaintiffs to the Defendants, by a deed of the

(1) 15 App. Cas. 19.
(2) 15 App. Cas. 22.

C. A. 1892 — RUABON BRICK AND TERRA COTTA COMPANY v. GREAT WESTERN RAILWAY CO. — Lindley, L.J.

30th of December, 1890, and for that purpose are entitled to enter upon the said land of the Defendants so conveyed as aforesaid, and to remove the ballast, 'fey,' or surface soil lying or being above such clay." Then, as a consequence of that declaration, it is ordered that the *Great Western Railway Company* be "restrained from hindering or interfering with the Plaintiffs' working their said clay under the land of the Defendants so conveyed as aforesaid, or entering the said land or removing the ballast, 'fey,' or surface soil, lying above such clay for that purpose."

Now, in all the other cases in which a railway company has been in litigation with a mine-owner, the railway company has been complaining of the loss of support under their railway, and the controversy has always been whether they are to buy the subjacent minerals in order to have a right of support. But the peculiarity of this case is, that in consequence of an agreement, to which I will allude presently, the railway company do not care about support by the subjacent minerals. They have under an agreement rights which render it immaterial to them whether the clay under the railway is dug out or not; and the whole controversy in this case is, not as to the right of the mineral owner to work under the railway, and if necessary to let it down, but as to the right of the mineral owner to come upon the surface and work his minerals from above downwards. It is a controversy which, in this acute shape at all events, is, so far as I know, substantially a new one.

Now, the first point to consider is, whether the rights of the parties depend upon the ordinary principles of real property law, or upon the statutory enactments contained in the *Railways Clauses Consolidation Act*, 1845, because their rights will depend very much upon the answer to be given to that question. I proceed, therefore, to investigate how that matter stands.

The history of this case, so far as it is material, is this. In 1889, the *Great Western Railway Company* promoted a bill in Parliament in order to obtain power to purchase this branch railway. The *Ruabon Brick and Terra Cotta Company*, the Plaintiffs, opposed that bill. Their opposition was withdrawn upon the terms of an agreement, three clauses of which are important.

The agreement is dated the 10th of August, 1889. The important clauses are the 3rd, 4th, and 11th clauses. The 3rd clause is: "If the said bill shall be passed so far as respects the said railway, the railway company shall, on or before the 13th day of September, 1889, serve upon the *Ruabon Company*, by delivering the same to Messrs. *Brabner & Court*, of 10, *Cook Street*, in the city of *Liverpool*, the solicitors for the *Ruabon Company*, notice to treat for the property comprised in the said plan hereunto annexed, and therein surrounded by a red line in pursuance of the *Lands Clauses Consolidation Act*, 1845." Then clause 4 is: "Notwithstanding anything contained in the said Act when obtained, the railway company shall be entitled to purchase from the *Ruabon Company*, under the compulsory powers to be obtained by them, only the land shewn upon the said plan hereunto annexed, and therein surrounded by a red line." Then clause 11 is this: "In the event of the *Ruabon Company*, in pursuance of the powers reserved by the *Railways Clauses Consolidation Act*, 1845, working the minerals lying under or within forty yards of the said railway, the railway company shall be entitled as and when such minerals are worked out and removed to enter into and upon the mines so worked, for the purpose of constructing, and to construct such and so many pillars or columns, and whether of brick or stone or other material, as in the opinion of the engineer for the time being of the railway company may be necessary to protect the said railway and works." That is to say, the railway company stipulate for a right which they otherwise would not have—a right to go into the clay pit and support their line as and when the clay is worked out. It is the existence of this clause which puts them in the peculiar position to which I have alluded, and which enables them to say, "We do not care anything about right to support by clay, as we have a right of support independently." Then it goes on to say: "But so that the railway company in constructing such works do not interfere with the working of the said minerals in accordance with the provisions of the said statute." Then there is a proviso that "nothing herein contained shall interfere with or affect the right of the *Ruabon Company* to compensation for minerals as provided by the said statute, or for

C. A. 1892 RUABON BRICK AND TERRA COTTA COMPANY v. GREAT WESTERN RAILWAY CO. L'ndley, L.J.

any interference with their free working or getting of same." In pursuance of that agreement the opposition of the Plaintiff company to the then pending Bill was withdrawn. The Bill passed and became a special Act of Parliament in the year 1889. In pursuance of the powers contained in that Act, and in the public Acts incorporated with it, a notice to treat was given by the *Great Western Railway Company* to the Plaintiffs, and the price of the land wanted by the *Great Western Railway Company* was ascertained by arbitration. On the 30th of December, 1890, the Plaintiffs conveyed to the railway company the land they wanted, excepting the mines. When we look at the history of this transaction, and at the terms of that agreement, and at the recitals in the conveyance, I think it is obvious and beyond all doubt that the rights of the parties are to be determined, not by the ordinary principles of real property law, but by the clauses relating to mines in the *Railways Clauses Consolidation Act* of 1845. Once get at that and you have advanced a very long way, because it is well known that the rights of the surface owner and the mineral owner under the *Railways Clauses Consolidation Act* sections are totally different from the rights which they would respectively enjoy if it were not for those statutory enactments. Nothing can shew that more plainly than a contrast, which I will not pause to make, between the decisions under the mining clauses in the *Railways Clauses Consolidation Act* and the cases upon the rights of lessors and lessees under mining leases, or cases which have arisen on the construction of *Inclosure Acts*. The contrast between the two classes of cases is most marked, and it is impossible to say that cases falling within the *Railways Clauses Consolidation Act* are governed by the same principles as those which relate to leases or *Inclosure Acts*.

We are driven then to the study of the sections relating to mines and minerals in the *Railways Clauses Consolidation Act*, 1845—that is to say, to that bundle of sections which are prefaced by the words, "And with respect to mines lying under or near the railway," commencing with sect. 77 and running down to and including sect. 85. The first of these sections is sect. 77, that the company shall not be entitled to any mines—I will read it shortly now—under any land purchased by them except any such

parts thereof as shall be necessary to be dug or carried away or used in the construction of the works, unless the same shall have been expressly purchased. As I have pointed out, in this particular case the mines were excepted and not purchased by the railway company. This probably would not have any further effect than the ordinary exception of mines from a grant. Then comes sect. 78, which I need not read in full, that mines lying near the railway are not to be worked if the company are willing to purchase them. Then comes sect. 79, which is very important: "If before the expiration of such thirty days the company do not state their willingness to treat with such owner, lessee, or occupier for the payment of such compensation, it shall be lawful for him to work the said mines or any part thereof for which the company shall not have agreed to pay compensation, so that the same be done in a manner proper and necessary for the beneficial working thereof, and according to the usual manner of working such mines in the district where the same shall be situate." There follow provisions about damage occasioned by improper working.

Now, what does that involve? It certainly involves this, that the mineral owner is entitled, if that section applies, to work his mine under the railway and as close up to it as the minerals extend, although the consequence is to derogate from his own grant and destroy the surface by letting it down—a right which no mineral owner has at common law under a conveyance worded similarly to that which I have read in this case. Again, a mineral owner has a right to work his mine not only, as I understand it, from below upwards, but under certain circumstances from above downwards. He has a right to work it so that the same be done in a manner proper and necessary for the beneficial working thereof, and according to the usual manner of working such mine in the district where the same shall be situate. What does that mean? It means, I apprehend, this: that if in any particular spot the minerals come so close to the surface that it is necessary for the beneficial working of those minerals, and according to the usual manner of working them in the district, that they shall be worked from above downwards, the mine-owner has a right to do it. The consequence is in that case the

C. A. 1892

RUABON BRICK AND TERRA COTTA COMPANY v. GREAT WESTERN RAILWAY CO.

Lindley, L.J.

destruction of the surface. The consequence of his working his mines, in the other case to which I have alluded, is also destruction of the surface. It is destruction in different ways, it is true. It is destruction in the one case by picking the surface up, and destruction in the other case by letting the surface down. The result is the same—destruction of the railway. That appears to me the necessary consequence if you once get out of the common law doctrines applicable to matters of this kind, and have to decide according to the *Railways Clauses Consolidation Act.*

Now, if we look at such decisions as there are on this point, they almost all of them are based upon the theory to which I have alluded, the theory being this: that as regards mines, the railway company have nothing to do with them until the time comes when the owner wants to work them so as to endanger the railway. It may never come at all. They may be minerals which cannot be worked at a profit, or so situate as not to be worth working, and in such a case the railway company get the right of support for ever for nothing. But if, on the other hand, the time does come for the mine-owner to work these mines, he is at liberty to say to the railway company, "If you do not buy me out in accordance with these sections, which of course you have a right to do, I shall work my mines regardless of the rights which but for the statute you would have had at common law." That is the position which these Plaintiffs have taken up, and that this is the view which has been taken through a great number of decisions is, I think, clear. I am not going through them at any length; but it is impossible to read the decisions upon these sections, beginning with the *Great Western Railway Company* v. *Bennett* (1) and coming down to the *Midland Railway Company* v. *Robinson* (2), both before the House of Lords, without seeing that the reasoning I have applied to this case is the reasoning which has been uniformly applied, without any exception whatever as far as I know except the possible exception in the judgment of Lord *Macnaghten* in *Midland Railway Company* v. *Robinson.* Lord *Macnaghten* does throw some doubt upon the question whether the mine-owner can go upon the surface and work from above downwards. The doubt thrown upon the proposition by

(1) Law Rep. 2 H. L. 27. (2) 15 App. Cas. 19.

a noble Lord of his eminence requires the greatest attention; but he stands alone, and without enumerating the long list of Lords and Judges who have taken the view of the sections which appears to me to be the right view, it seems to me that it is impossible for us to give effect to the doubt expressed by Lord *Macnaghten*. Sir *Horace Davey* urged that the Plaintiffs have no right to use the Defendants' property to work theirs, and that that is a very different thing from a right to work their own property to the detriment of the *Great Western Railway Company*. I see the difference, of course; but I see no trace of it in these legislative enactments.

It appears to me, therefore, without going further into the decisions, that the appeal fails, and must be dismissed with costs.

BOWEN, L.J.:—

I should add nothing were it not for the great importance of this question.

It seems to me that the whole case turns upon the true construction of sect. 79, and the two preceding clauses of the *Railways Clauses Consolidation Act*, 1845. The point is whether, under sect. 79, which reserves to the mine-owner the right, if the company is unwilling to purchase, to work the mines (which include clay, stone, and minerals which can be got by open working) according to "the usual manner of working such mines in the district," the owner of clay is entitled not merely to work underground and let down the surface, but actually to go upon the lands which the railway company has in the first instance acquired, to disturb the surface and remove it so far as is necessary to reach his clay.

We must, in the first place, consider carefully the code or *fasciculus* of clauses in sects. 77–85. Sect. 77 provides, with respect to mines lying under or near the railway, that the company is not to be entitled to any mines or minerals under any land purchased by them except only such parts as are necessary to be dug or carried away, or used in the construction of the works, unless the same shall have been expressly purchased, and all such mines, excepting as aforesaid, shall be

C. A. 1892

RUABON BRICK AND TERRA COTTA COMPANY v. GREAT WESTERN RAILWAY CO.

Bowen, L.J.

deemed to be excepted out of the conveyance of the lands unless they be expressly named therein and conveyed thereby.

Now, it is not perhaps a very admirable way of dealing with an Act of Parliament which is intended to be read together, to read one section without the light of the sections which follow; but, for the purpose of making the meaning clear of what I am about to say, I will assume that the Act of Parliament paused there, and that there was no other limitation of right or creation of right contained in the sections which follow. What would be the position of the railway company if the Act of Parliament were so worded? According to the ordinary theories of law, a person who grants to an individual or to a corporate body land for the purpose of making upon the land some work like a railway, a canal, or other buildings, impliedly is taken, unless there is any provision to the contrary contained in the document which describes the rights, to grant also that necessary support which both parties must be supposed to have known would be required, and without which his grant would become ineffectual and futile. You must look very carefully at the document which creates the rights of the parties to see what was the true intention of the document, whether it is a grant or an Act of Parliament, as to the exact amount of title which is to be created, and the exact amount of title which is intended to be reserved out of the grant. If that section stood alone, it seems to me that there would be nothing to shew that the ordinary implication of law was not to follow, so that the mine-owner, although his mines were excepted out of the grant, would be nevertheless bound to leave all the necessary support without which it would be idle to sell the land to the railway company. I think that I am not alone in this view, not only because my Brother, the Lord Justice who has preceded me, has stated that to be his impression, but also because Lord *Selborne*, in *Dixon* v. *Caledonian and Glasgow and South Western Railway Companies* (1) says that in his opinion sect. 70 of the *Railways Clauses Consolidation (Scotland) Act*, 1845, which is identical with sect. 77 of the English Act, would not, if it stood alone, deprive the railway company of the ordinary right to support; and I do not follow the contrary

(1) 5 App. Cas. 820, 829.

view expressed by Lord *Westbury* in *Great Western Railway Company* v. *Bennett* (1). But sect. 77 does not stand alone, and it is in sect. 79, as it seems to me, that we find the language of the Legislature which interferes with the complete enjoyment of the railway for railway purposes which otherwise the railway company would have possessed; and what we have to decide is, to what extent does sect. 79 go?

I pause for a moment to remark that, although the cases use the expression "surface land" as distinguished from land below the surface, what the railway company really gets under sect. 77 is all the land, whether on the surface or below the surface, which is not mines. In the present appeal the only matter which we have to consider is the actual surface. There is no such distinction drawn in sect. 77, or, as it seems to me, in sect. 79, as a distinction between lands on the actual surface and lands which are not mines, although they are below the surface. What then does sect. 79 do in favour of the mine-owner? It certainly takes away rights of adjacent and subjacent support to some extent, from and after a particular moment. If the mine-owner wants his mines, and is desirous of working them, then the occasion arises; and if the railway company, upon notice, are unwilling to purchase them, then he may, so far as is necessary for the enjoyment of his own mine, destroy the adjacent and subjacent support. In the case of an underground mine you may let down the surface from and after that moment; up to that moment the railway company are not threatened, and they enjoy the benefit of the adjacent and subjacent support. It is not perfectly correct to say that under the Act the railway company get no right to adjacent and subjacent support; they get every right to adjacent and subjacent support, it seems to me, which they want, except so far as the mine-owner at any particular moment requires to utilize his mines. It is admitted, therefore, as I have said, that from and after that moment, and on the fulfilling of all the conditions precedent up to that moment, the mine-owner may, if he requires it, let down the surface even if it involves letting down the railway. No injustice can be caused, because the railway company can purchase:

(1) Law Rep. 2 H. L. 27, 41.

C. A. 1892

RUABON BRICK AND TERRA COTTA COMPANY v. GREAT WESTERN RAILWAY CO.

Bowen, L.J.

if they do not, the mine-owner is free. But the distinction raised in this particular appeal is with reference to the extent to which the section goes. Does it also intend, in addition to giving the right to withdraw the support to the surface, to justify such acts as otherwise would be acts of trespass upon the surface? For business purposes the distinction, of course, would naturally strike one as very fine. If the mine-owner may, in the enjoyment of his property, let down the railway, it seems somewhat subtle to suppose that, provided the usual manner of working the mine justifies it, he may not enter upon the surface and dig upon the surface; but, although the distinction is a subtle one, to the eye of the lawyer it is a perfectly clear one, and that it has a business value is apparent from what we have been told in the argument in the present case.

The question, therefore, really arises, whether it is a distinction which we can find in the Act of Parliament. If that distinction is to be drawn, the first observation which seems to me to arise is that you have to exclude from the protection of sect. 79 the rights of a mine-owner whose mines consist of clay, gravel, or such minerals as are worked from the surface in cases where what he wants to work is mineral lying immediately under the line, and which can only be got conveniently according to the usual manner of working, by taking up the railway. You have to exclude it from sect. 79 because, although the usual manner of working the mines in the district would justify the taking away the surface, yet, nevertheless, in this particular case it is said the Act of Parliament did not mean to give it.

The second observation which arises, and as it seems to me, arises with considerable force, is that if that distinction is to be drawn, there is no provision made, as far as I can see, in the *Railways Clauses Consolidation Act* itself for the assessment of compensation for the purchase by the railway company and the payment by the railway company of that right of the mine-owner. You are taking from him, if that is the true construction of the section, the natural facility of working his mineral by means of quarrying which is usual and which is convenient; and when is he paid for it, or how is he paid for it? There is

nothing in sect. 81, I think, treating it as a mere matter of construction of the section, to give the mine-owner the means of obtaining compensation for that facility of which he is deprived. Sect. 81, as has been pointed out in argument, does not cover all the cases that would arise; and Sir *Horace Davey* and Mr. *Cripps*, with whose argument I was very much impressed, could only reply to the difficulty which arose in respect of that point by turning to the *Lands Clauses Consolidation Act*, and saying that under that Act the mine-owner would be able to obtain compensation. But when would he obtain it? When would the railway company have to pay it? It seems to me that they would have to purchase it when they purchased the land; but if that is so, they would have to purchase it before they are threatened; they would have to purchase it before it was at all certain that the mine-owner would want the clay, and they would therefore have to buy it in the dark. It would be almost impossible to assess the proper value which they ought to pay, because you never could tell the exact chances of the mine-owner wishing to work his quarry, or the extent or depth to which he would work it. And if you have to pay him the price before you know whether the mine-owner would require the clay, consider how you would defeat the whole object of this code, as it has been expounded by Judge after Judge and Court after Court. What does Lord *Cranworth* say in *Bennett's Case* (1)? "The object of the statute evidently was to get rid of all the ordinary law on the subject, and to compel the owner to sell the surface, and if any mines were so near the surface that they must be taken for the purposes of the railway, to compel him to sell them, but not to compel him to sell anything more. The land was to be dealt with just as if there were no mines to be considered; nothing but the surface. That being so, justice obviously requires that when the mine-owner thinks it beneficial to him to work his mines, and proceeds to do so, he should be just in the same position as if he had never sold any part of the surface at all. If he had not compulsorily parted with the surface, he might have worked his mines, sinking his shaft from the very surface down to the very bottom of the mine. The object of the statute was that, for

(1) Law Rep. 2 H. L. 27, 40.

C. A. 1892

RUABON BRICK AND TERRA COTTA COMPANY v. GREAT WESTERN RAILWAY CO.

Bowen, L.J.

the purpose of the railway, the company was to take (and it was a very beneficial provision for the company) that, and that only, which is necessary for the purpose of the railway; and that all the rest should be left to be dealt with, whenever the time for working the mine should arrive. It is plain to me, upon the construction of that clause of the statute, that that was the intention of the Legislature."

Therefore, if compensation is to be given to the mine-owner at the time when the land is purchased, he gets it at a moment when to give it him would defeat this cardinal object of the code which we are construing, and, as was pointed out by my Brother Lord Justice *A. L. Smith*, it would be extremely difficult to measure the compensation which ought to be given, and I think I may say that it is unheard of that compensation for any loss of facilities for getting minerals should be asked for at the time of the purchase of the land.

We come back, therefore, to the meaning of the words in sect. 79, and ask ourselves whether there is anything in the words, "usual manner of working such mines," which is reasonably intended to cover such cases as the present; and, for the reasons I have given, it seems to me that the words ought to cover them, as a matter of business and as a matter of fair play between the company and the mine-owner. It is said, indeed, that sect. 79 cannot be intended to take away from the railway company what they have purchased, namely, the right to the surface, and to use the surface for the purposes of their railway; but that argument goes too far. Sect. 79 certainly does operate from and after a particular moment to deprive them of the full enjoyment of what they have bought. The question, therefore, is not whether their enjoyment of what they have bought is interfered with, but how far it is interfered with. The cardinal object of the code is that the railway company shall not be obliged to pay anything for the mines until the mine-owner desires to work, and that the mine-owner shall be at liberty, unless the railway company shall then buy, when the critical moment comes, to enjoy his property to the full; otherwise this code would really become a means of confiscation.

With regard to the authorities I shall say very little. In the

Great Western Railway Company v. *Bennett* (1), it is obvious that Lord *Chelmsford's* language and Lord *Cranworth's* language, if read in the ordinary sense of words, justified the judgment below; and Lord *Cranworth's* reasoning as to the object of the Act, I think, explains the position which the Respondents assume here. We come next to *Errington* v. *Metropolitan District Railway Company* (2), where the late Master of the Rolls, Sir *George Jessel* (3), and the present Master of the Rolls (then Lord Justice *Brett*) (4), in terms say that you may dig the surface to get at mineral which is properly worked by digging the surface. It is true those expressions may not be said to be strictly a decision upon the point, but they shew the view that those learned persons took of the objects of the Act. We come next to the *Midland Railway Company* v. *Miles* (5), where Mr. Justice *Stirling* adopts the same view, basing himself upon the previous decisions and upon the reason of the thing. Finally we come to the important case of *Midland Railway Company* v. *Robinson* (6). I desire to say a word or two upon what must have been decided by that case. It was an action in which the mine-owner was approaching the railway at some little distance, and he served a notice to treat which covered the land under the line, and the land adjacent for some considerable distance. He threatened in his notice that unless the company bought he would work those minerals which were minerals of the exact legal kind to which the minerals in the present case belong. He threatened, that is to say, to work the minerals close to and under the line by open quarrying. It is said, and said with truth, that the chief point which the Court were considering was the validity of the notice; but the action was one for an injunction to prevent the mine-owner from working, and the mine-owner was justifying his threat by the notice, and if the notice broke down, or if the threat went beyond what is legal, the injunction would have been modified, it must have been granted in a modified form and not in a complete form. The business importance of the point may not have struck the Court as it does us after the

(1) Law Rep. 2 H. L. 27.
(2) 19 Ch. D. 559.
(3) Ibid. 572.
(4) 19 Ch. D. 577.
(5) 33 Ch. D. 632.
(6) 37 Ch. D. 386; 15 App. Cas. 19.

C. A. 1892 RUABON BRICK AND TERRA COTTA COMPANY v. GREAT WESTERN RAILWAY CO. Bowen, L.J.

manner in which our attention has been called to it here; but the right of the mine-owner to get the minerals underneath the line by open quarrying seems to me to be involved in that case. Mr. Justice *Chitty* gave judgment dismissing the action. When the matter came to the Court of Appeal, Lord Justice *Cotton* seems to imply (1) that the judgment he was giving as to the right of the mine-owner to advance upon the railway included his right to quarry right through the line, because in answer to the argument *ad convenientem* that that would destroy the line, he replies, "Well, but the railway company have only got to purchase." Still it is true that the importance of the point perhaps was not brought to the attention of the Court there. But when the matter came to the House of Lords, it seems to me that the point was actually pressed upon the House of Lords in argument. At page 22 the argument used by Mr. *Rigby* is that the Legislature could not have intended to give the landowner leave to break up the railway line by quarrying through it. Sir *Horace Davey* replied, "There is no difference in principle between stripping off the surface and digging out the minerals, and working underground within six feet of the surface and so letting the railway down." Upon that Lord *Macnaghten* intimated his doubt—a doubt to which he adhered in his judgment, but a doubt in which he was not followed by the rest of the House—as to the logical necessity of allowing a man to trespass on the surface because he had a right to destroy the surface by underground working. Although, therefore, the exact point which is raised in this case may not be said to be the point which was decided by the House of Lords in their judgment, it was pointedly brought, it seems to me, to the attention of the Lords that the construction which they put upon sect. 79, if they held that mines and minerals there included such mines and minerals as could only be got by digging through the surface, would, of necessity and as a logical sequence, lead to the conclusion that you might quarry right through the line in order to get at the minerals under the line, and with that logical sequence in their minds Lord *Herschell* and Lord *Watson* used language which seems to me to imply that that was a consequence which they

(1) 37 Ch. D. 398.

faced, and which they thought must be faced, in order to give the railway company on the one side and the mine-owner on the other side, the full benefit which the Act of Parliament intended they should respectively enjoy. Lord *Herschell* was perfectly alive to the difficulty of the point; he was perfectly alive to the desirability, if you could do so, of construing the sections so as to limit the powers of interference with the railway; but nevertheless, having looked all round it, he came to the conclusion that there was no distinction to be made between mines and minerals which could conveniently only be quarried from above and the mines and minerals which could be obtained from underground working. I think that although it cannot be said to have closed the door to the argument which has been addressed to us, and that it still is open to the counsel for the Appellants to ask us to pronounce a contrary view to that which was expressed by Lord *Herschell* and Lord *Watson*, nevertheless their judgments follow a long chain of authority which seems to me to imply that sect. 79 gives the power to disturb the surface in order to get at minerals which are worked from the surface, if that is the usual and ordinary way of working them in the district.

The judgment of the Court below, therefore, seems to me to be correct, and this appeal ought to be dismissed with the usual consequences.

A. L. SMITH, L.J.:—

The question is whether the mine-owners, the *Ruabon Brick and Terra Cotta Company*, can justify what they are doing and intending to do under the group of sections in the *Railways Clauses Consolidation Act*, 1845, commencing at sect. 77, and more especially under sect. 79 of the Act. It has now been held by the highest authority that the minerals mentioned in these sections include not only minerals won by underground workings, but also minerals won by open workings, such as by quarrying; and it is not disputed that the terra-cotta clay, which is in question in this case, is a mineral within these sections. It has also been held by like authority that if when due notice is given by the mine-owners to the railway company to purchase the under-

C. A. 1892. RUABON BRICK AND TERRA COTTA COMPANY v. GREAT WESTERN RAILWAY CO. A. L. Smith, L.J.

ground minerals lying under its railway, and the company is not willing to do so, then the unpaid mine-owner (if he works his minerals in a manner proper and necessary for the beneficial working thereof, and according to the usual manner of working in the district) may work such minerals underground even though, by so doing, he lets down and destroys the surface of the railway and its works. In such case, upon action brought by the railway company against the mineral owner for letting down the surface of the railway, the mineral owner can justify under sect. 79 and the other sections grouped therewith, and this is not disputed. Why, then, having got thus far by means of decided cases which cannot be controverted, is an unpaid mine-owner who wins his minerals by quarrying in the accustomed manner to be in a worse position than an unpaid mineral owner who wins his minerals by mining? I cannot, myself, see why if the one can justify under the statute the other cannot. If the action against a mine-owner for letting down the surface of the railway were in trespass it would be identical with the present case; but does the fact that the one cause of action is upon the case and the other in trespass affect the nature and validity of the defence which the mine-owner has under the statute? If pleadable with success in an action upon the case, why is it not equally pleadable in an action of trespass? If Sir *Horace Davey* and Mr. *Cripps* are correct, they must establish that different rights are given to the mine-owner in sect. 79 when applied to an owner whose minerals are worked underground, and to an owner whose minerals are worked above ground. In the one case it is conceded that the unpaid mine-owner may win his minerals (working them in the accustomed manner) without let or hindrance from the railway company, whereas in the other it is now said he cannot. I can find no such distinction in the section. The fact is that when once the word "owner" in sect. 79 is held to include an owner whose minerals are worked from underground and also an owner whose minerals are worked from the surface, it follows, as it seems to me, that each, if he works in the accustomed manner, has the same protection under the statute, and it makes no difference whether in the one case the surface is let down or in the other it is trespassed upon. The substance of the defence

under the statute is that if the mine-owner is unpaid for the minerals, and the company does not purchase them when the time arrives for it to do so—that is, when the mine-owner desires to work his minerals, then the mine-owner may proceed to win his minerals in the accustomed way irrespective of the company's works. The company must pay for the minerals whether they are worked by mining or quarrying, in order to prevent the mine-owner from working them; otherwise he may proceed in the accustomed manner to win them. This is my view of sect. 79 of the statute. There has been, however, upon the point now in dispute at the least a sequence of *dicta* of peculiar authority all tending in the same direction, with one exception, weighty though it is—that of Lord *Macnaghten*. The *dicta*, without referring further to them, are those of Lord *Chelmsford*, Lord *Cranworth*, Lord *Herschell*, Lord *Watson*, Sir *George Jessel*, Lord Justice *Brett*, Lord Justice *Cotton*, and Mr. Justice *Stirling*: all one way, and all in antagonism to the point which is now argued before us by the Defendants; and though I agree that they are not direct authorities, they are weighty opinions of those learned Judges.

I do not consider Lord *Esher's* two *dicta*, the one in *Errington* v. *Metropolitan District Railway Company* (1), and the other in *Pountney* v. *Clayton* (2), to be necessarily in conflict. I do not recapitulate the opinions to which I have referred, as they have been fully discussed; but I must add that there appear to me to be two decisions very much in point. The one is the case of the *Midland Railway Company* v. *Miles* (3), in which my Brother Mr. Justice *Stirling*, decided the present point, excepting—if it be an exception—that upon the *locus in quo* in that case the rails were not actually laid, and I agree in the conclusion he arrived at. There is also the case of the *Midland Railway Company* v. *Robinson* (4), which is very much in point, and I agree with the observations which have fallen from Lord Justice *Bowen* as to that case.

For these reasons (whether you take the sections of the Act, or the *dicta* and the two authorities I have alluded to), I am

(1) 19 Ch. D. 559.
(2) 11 Q. B. D. 833.
(3) 33 Ch. D. 632.
(4) 37 Ch. D. 386; 15 App. Cas. 19.

C. A. 1892 — RUABON BRICK AND TERRA COTTA COMPANY v. GREAT WESTERN RAILWAY CO.

of opinion that my Brother Mr. Justice *Kekewich* was correct in the judgment he arrived at, and that this appeal should be dismissed.

Solicitors: *R. R. Nelson; Pritchard, Englefield & Co.*, agents for *Brabner & Court, Liverpool.*

W. W. K.
H. C. J.

C. A. 1892 — *Nov.* 22, 23, 24, 25, 28; *Dec.* 13.

In re CATHCART.

Lunacy—Alleged Lunatic—Inquiry into Mental Condition—Alleged Lunatic found of Sound Mind—Costs of Inquiry—Appeal—Lunacy Act, 1890 (53 & 54 *Vict. c.* 5), *ss.* 90, 94, 98, 109—*Rules of Supreme Court*, 1883, *Order* XLVI., *r.* 1.

An inquiry instituted on the petition of a husband as to the state of his wife's mind resulted in a finding that she was of sound mind and capable of managing herself and her affairs. The Lords Justices sitting as Judges in Lunacy made, on the application of the Petitioner, an order that two-thirds of his costs of the inquiry and also his costs of the application should be paid by the wife. Subsequently an order was made by a Judge charging the costs on certain Consols belonging to the wife and standing in her name, and directing the transfer by her of a sufficient amount to meet such costs; and, as she neglected to make the transfer, a further order was made by the Judge that the official solicitor should execute the necessary transfer. On appeal against these orders:—

Held, that an appeal would lie in such a case to the Court of Appeal, and that no leave to appeal was necessary:

Held, also, that the Lords Justices had authority under sect. 109 of the *Lunacy Act*, 1890, to direct that the costs should be paid out of the wife's estate, including those incurred after the finding that she was of sound mind:

Held, also, that the procedure under Order XLVI., rule 1, which deals with charging orders, was not applicable to such an order, and that the subsequent orders to enforce the charge were proper to carry it into effect:

Held, also, that, under the circumstances of the case, the discretion of the Lords Justices had been rightly exercised.

APPEAL from a judgment of the Lords Justices sitting as Judges in Lunacy (1).

The question before the Lords Justices was by whom should be borne the costs of an inquiry into the mental condition of Mrs.

(1) [1892] 1 Ch. 549.

Cathcart, which had resulted in a finding that she was of sound mind and capable of managing herself and her affairs. The Court (*Lindley*, *Bowen*, and *Kay*, L.JJ.), held upon the evidence that there were sufficient grounds to justify the Petitioner in instituting the inquiry; and that, under the circumstances of the case, Mrs. *Cathcart* must pay her own costs, and that the Petitioner (her husband) ought to receive two-thirds of the amount of his costs of all the proceedings (to be taxed as between party and party), and the costs of the application to the Court, out of property belonging to his wife, consisting of several sums of New Consols, not comprised in their marriage settlement. The facts upon which the Court came to this conclusion are fully set out in the report of the case (1).

On the 3rd of August, 1892, an order was made by Mr. Justice *Bruce*, sitting as an additional Judge in Chancery, that the taxed costs of the Petitioner, dealt with by the order of the Lords Justices, and his costs (when taxed) of the application then before the Judge, should be charged upon and paid out of certain specified sums of New Consols (amounting in all to over £10,000) standing in the name of Mrs. *Cathcart* at the *Bank of England*; that the Taxing Master should certify what sum of New Consols was, at the average price of the day, equivalent to the aggregate amount of such costs; and that Mrs. *Cathcart* should within seven days execute a transfer to the Applicant of so much of the New Consols standing in her name as should be equal to the amount of New Consols to be certified as aforesaid.

Mrs. *Cathcart* neglected to make the transfer directed by the above order, and on the 31st of October, 1892, Mr. Justice *Bruce* made a further order to the following effect—that the official solicitor be nominated to execute on behalf of Mrs. *Cathcart* a transfer to *C. T. Arnold*, one of the solicitors of the Petitioner, of the amount of New Consols certified by the Master under the order of the 3rd of August—that the costs of the application then before the Judge should be charged upon the New Consols standing in Mrs. *Cathcart's* name; that such costs should be taxed, and that the Taxing Master should certify what sum of New Consols was, at the average price of the day, equivalent to

(1) [1892] 1 Ch. 549.

C. A. 1892 *In re* CATHCART.

the aggregate amount of such taxed costs, and that Mrs. *Cathcart* should execute a transfer of such an amount of New Consols as should be equivalent to the sum so certified.

Mrs. *Cathcart* appealed against the judgment of the Lords Justices and against the orders of the 3rd of August and the 31st of October.

1892. Nov. 22. Sir *H. James*, Q.C. (*English Harrison* and *P. S. Stokes*, with him), objected that an appeal would not lie. Sect. 109 of the *Lunacy Act*, 1890 (1), provides that the costs of such an inquiry are to be in the discretion of the Judge in Lunacy. Before the *Judicature Acts* an appeal lay to the Privy Council, and those Acts substituted the Court of Appeal. Sect. 109 declares that an Order in Lunacy as to costs is to have the effect of an order of the High Court. It consequently carries with it all the incidents of a similar order of the High Court, one of which is that under sect. 49 of the *Judicature Act*, 1873, there is no appeal without leave, and no leave has been given in the present case.

[The Court decided to hear the appeal.]

R. O. B. Lane, Q.C., and *R. F. Norton*, were then heard in support of the appeal:—

There was no jurisdiction in the Court to make the order. Sect. 109 of the *Lunacy Act*, 1890, may authorize an order as to the costs of the inquiry; but the order in question goes much further, and deals with costs of proceedings subsequent to the finding of the jury that Mrs. *Cathcart* was not insane. When these costs were incurred she was neither a "lunatic" nor an "alleged lunatic." Whatever costs the Court could deal with by charging them on Mrs. *Cathcart's* estate could only be recovered

(1) 53 & 54 Vict. c. 5, s. 109: "The costs of all proceedings for the purpose of ascertaining whether a person is lunatic, and of all proceedings in the matter of a lunatic shall be in the discretion of the Judge in Lunacy, who may order all or any of such costs to be paid by the lunatic or alleged lunatic, or to be charged upon and paid out of his estate, or such part thereof as the Judge thinks fit, or by any other party to the proceedings . . . and every such order shall have the effect of an order of the High Court."

in the manner directed as to all charging orders by Order XLVI., rule 1 (1), that is, by the procedure enacted by 1 & 2 Vict. c. 110, s. 14; consequently the order of the 3rd of August directing a transfer was made without authority. Such a departure from the ordinary procedure in cases of charging orders might prejudice prior incumbrancers. If such an order could be made no doubt the official solicitor might be directed to execute the necessary transfers; but this latter order must stand or fall with the former.

[They also argued on the facts that the order should not be supported.]

Sir *H. James*, Q.C., and *P. S. Stokes* (*English Harrison*, with them), were heard in support of the orders appealed against.

1892. Dec. 13. LORD HALSBURY read the following judgment:—

This is an appeal from an order made by Lords Justices *Lindley*, *Bowen*, and *Kay*, sitting as Judges in Lunacy, and the first question raised is whether the order is subject to an appeal to the Court of Appeal.

By the 18th section of the *Judicature Act*, 1873, sub-sect. 5, "all jurisdiction vested in or capable of being exercised by Her Majesty in Council, or the Judicial Committee of Her Majesty's Privy Council upon Appeal . . . from any Order in Lunacy made by the Lord Chancellor, or any other person having jurisdiction in Lunacy," is given to the Court of Appeal. That there was an appeal from an order of the Lord Chancellor exercising jurisdiction in Lunacy is certain. On the 14th of February, 1726 (2), it was determined by the House of Lords, after debate and partly in view of the statute 17 Ed. 2, *de prerogativâ regis*, that no appeal from such an order lay to the House of Lords, because the appeal must be made to the Crown itself in Council.

In consequence of this resolution of the Lords, the appeal

(1) Order XLVI., rule 1: "An order charging stock or shares may be made by any Divisional Court or by any Judge, and the proceedings for obtaining such order shall be such as are directed, and the effect shall be such as is provided by the Acts 1 & 2 Vict. c. 110, ss. 14, 15, and 3 & 4 Vict. c. 82, s. 1."

(2) Note to *Sheldon* v. *Fortescue Aland*, 3 P. Wms. 107.

C. A. 1892 *In re* CATHCART. Lord Halsbury.

then in question was brought before the King in Council, the jurisdiction was debated and affirmed on the 15th of May, 1728, and the matter of the appeal determined.

That determination was repeatedly recognised afterwards as a governing authority, and it was hardly questioned here that, unless a rule made under the rule-making power created by the *Judicature Act* has taken away the appeal, the right of appeal still exists.

But it is said that the nature of this order is such that it is not subject to appeal. That question depends on the true construction of the 109th section of the *Lunacy Act*, 1890, as affected by the 49th section of the *Judicature Act*, 1873.

The words of sect. 109, so far as they are material to the present question, are that the order for costs "shall have the effect of an order of the High Court." The section does not make it an order of the High Court. It does not enact that it shall be deemed an order of the High Court, or any equivalent phrase which would invest the order when made with all the incidents and qualities of an order of the High Court.

The effect of the order is, I think, its operative power as an order; and if it had been intended to attach to an order made under the 109th section all the provisions which are made with reference to orders made by the High Court, I cannot but think that something more than one compendious phrase (which, however, as I have said, will not in my opinion bear that meaning) would have been used when the Legislature were dealing with the very peculiar jurisdiction exercised over the person and property of a lunatic.

It may well be, as was said by Lord *Selborne* in the House of Lords (1), that when the merits of a question have been determined, and when a Court, in the exercise of its discretion, has thought fit to give or refuse costs, and in the absence of any settled principle upon the subject, the Courts of Appeal must give so much credit to the exercise of that discretion as not to allow the merits, when they are no longer in controversy, to be again gone over with great expenditure of money and time, for the mere purpose of reviewing that discretion. It would, however, be in my view a total

(1) *Metropolitan Asylum District* v. *Hill*, 5 App. Cas. 582.

misapplication of the phrase, "the merits of the question," to apply it to the inquiries directed on behalf of a person alleged to be a lunatic. It must be treated rather as a question in some respects as to the proper expenditure of money on behalf of the alleged lunatic; the merits do not depend on the result of the inquiry at all. Sir *Henry James* very truly said that the question of the propriety or impropriety of the inquiry, and facts relevant to that question, might be wholly irrelevant to the issue which the jury were called upon to determine. I think there is no true analogy between proceedings of the character now in question and proceedings either between hostile litigants, or even claims against an estate or a fund wherein claimants in their own interest are endeavouring by legal process to get something for themselves.

The theory upon which proceedings in Lunacy are taken is, that the proceedings are for the benefit and protection of the persons who are believed to be incapable, by reason of mental infirmity, of protecting themselves and their property. The principle, therefore, applicable to a litigant who has failed in his litigation is not even *primâ facie* applicable to a petitioner who asks for the protection of the law in favour of one requiring the law's protection.

Lord Justice *Turner*, replying to the argument that the jury had found the alleged lunatic to be of sound mind, and that therefore the costs ought to be paid by the persons originating the inquiry, said that upon that ground alone he would not give the costs or any part of them. "The Crown," he said, "has the care and custody of the persons and estates of lunatics as *parens patriæ*. It exercises its parental power at the instance of the relations or friends of the alleged lunatics who apply to it on their behalf, and nothing, in my opinion, could be more prejudicial to the welfare of the unfortunate persons on whose behalf such applications are made, than to give any countenance to the notion that the applications will of necessity subject the persons by whom they are made to the payment, not merely of their own costs, but of all the costs which may be incurred, if in the result the verdict of a jury should establish that the applications cannot be supported. To lay down any such doctrine

C. A. 1892 *In re* CATHCART. Lord Halsbury.

would, in many instances at least, go far to paralyze the power of the Crown, and to deprive those who may unhappily be visited by mental disease of the care and protection which by virtue of that power is thrown around them in the exercise of the jurisdiction in Lunacy" (1). The Lords Justices were, doubtless, there dealing with an application by the alleged lunatic that the person engaged in asking for the inquiry should be ordered to pay all the costs of the proceedings; but the principles upon which the learned Judge founds his judgment have a wider application than the circumstances of the particular case.

It seems to me that if the demand for inquiry is really prompted by a desire to protect the person and property of the alleged lunatic, and is presented on reasonable grounds and in a reasonable manner, the expense of such a proceeding ought not to fall upon the person so invoking the aid of the law to protect those in need of protection. It is significant that in the case just quoted the doubt was expressed, whether in the then state of the law it was competent to the Court to order the costs of the lunatic, or alleged lunatic, to be paid by the Petitioner. The 109th section appears to have been framed in the widest possible terms to give complete jurisdiction to the Court to award the costs in accordance with what may appear to be right.

In saying what I have as to the apparent policy of the law, I have to some extent anticipated what I have to say with respect to the principle which should guide the Court in deciding this particular appeal.

I am reluctant to indicate any difference of opinion from that given by Lord Justice *Lindley* in his most valuable analysis of the considerations by which a Court should be guided in exercising the discretion as to costs given by the statute, and certainly as to the first four heads I am heartily in agreement; but I fear I cannot concur in considering the means of the respective parties as a topic that ought to enter into the question, though as to the latter part of the fifth head of the learned Judge's analysis I entirely concur. It is quite true that either party may by his conduct render an inquiry much more expensive than it might otherwise have been, and undoubtedly had there

(1) *In re Windham*, 4 D. F. & J. 53, 66.

in this case been a cross-appeal, that consideration might have been a very serious one indeed.

It is necessary, very shortly, to glance at the facts. Now, whatever may have been the real state of Mrs. *Cathcart's* mind in September, 1887, she certainly by her conduct gave rise to a reasonable suspicion that she was not completely of sound mind. No explanation has ever been given of her accusations against her husband, admitted now by every one to be unjust, but recurred to over and over again with persistent pertinacity, and acted upon by Mrs. *Cathcart,* so that within a short time of her marriage she separated from her husband, and never willingly associated with him again.

Again, she had, or supposed she had, some complaint to make as to settlements. I will assume in favour of her sanity that her complaint was well founded—though it is only for the sake of argument I assume it. It is impossible to believe in a sound state of mind in a person who, upon the assumption I have made, accuses every person engaged in the arrangement of the settlement of fraud, and mixes up the supposed fraud with persons and things ridiculous in their absurd incongruity. Most unfortunately, as I think, the husband was badly advised. The letters of October, 1887, are not written as if by a considerate husband, conscious of his wife's mental weakness, but rather as if by a hostile litigant threatening proceedings, and, not for the only time in this narrative, giving rise to the accusation that the motive which actuated him was not conjugal tenderness, but involved some considerations of self-interest. The same may be said of the negotiations in the following March. They partake more of threat than persuasion, and they seem to have had the effect of arousing Mrs. *Cathcart's* suspicions that she was to be treated as a lunatic. Then came the application to the *Skipton* magistrates—an application to treat every one who had anything to do with the settlements as guilty of some criminal offence—and I must say that, if the husband had proceeded after the receipt of Mr. *Preston's* letter and inclosure to apply to the Court, I do not think any one could have objected to the proceeding as hasty and uncalled for. Unfortunately, Mr. *Cathcart* took the matter into his own hands. The letter written to his wife was, I

C. A. 1892 *In re* CATHCART. Lord Halsbury.

fear, not a candid one. I cannot doubt that he did intend to get his wife into an asylum. In some parts of this case I am quite willing to make allowance for a layman, to some extent in the hands of those who ought to have known better, when he took wrong forms of procedure; but I cannot think the proceedings at *Ashbourne* admit of any such palliation. It did not require a lawyer to inform him that it was neither kind nor considerate to force himself into his wife's room, where she was quietly asleep, and take her by force after twelve o'clock at night, probably much later, and drive away with her a distance of seven or eight miles. I do not believe that there was no intention to place Mrs. *Cathcart* in an asylum. The two nurses, the attendant from the *Stafford Asylum*, the midnight visit to the doctor at *Ashbourne*—form such a combination of facts that I come to the conclusion very firmly that, notwithstanding the not very creditable letter written by Mr. *Cathcart*, his object was to place her in an asylum; and if the costs now in question were applicable to any part of this transaction, I should certainly not be a party to relieving Mr. *Cathcart* from the payment of them. The procuring of Mrs. *Cathcart's* signature to the authority to deal with the local banking account and the rent of *Wootton* form part apparently of the same scheme, and appear to me, as part of the same scheme, to be equally indefensible.

But the costs now in question have no relation to the transactions I have been describing. The costs are applicable to the inquiry originated by a petition dated the 8th of April, 1891, praying for an inquiry into the alleged lunacy of Mrs. *Mary Cathcart*; and if they were only such costs as were rendered a necessary expenditure by the petition in question, I do not think that under the circumstances of Mrs. *Cathcart's* then mental condition, and her uncontrollable disposition, the question could have been plausibly argued. Unfortunately for Mr. *Cathcart*, he has here again, as it seems to me, been very badly advised; but what I have said before about his proceedings at *Ashbourne* is no longer applicable. He might, I think, without any personal default, be under the impression that he was justified in proceeding under an urgency order because he was so advised.

I cannot myself too earnestly deprecate such an application

of the power given under the statute. An urgency order is what its very name indicates. The safeguards for personal freedom, which the Legislature had provided, were obviously considered inappropriate to cases where instant intervention was required, either for the sake of the alleged lunatic, or for the sake of the public; and accordingly exceptional provisions were made for such a contingency; but to suggest that they could be resorted to because there were no other means of getting evidence is so strange and perverse a view that I was much surprised to hear it gravely put forward. It is enough, however, at present to say that there is no foundation whatever for such a contention. In respect, however, of Mr. *Cathcart's* responsibility for such a course of procedure, it would be a very harsh judgment to attribute to him the grave error that in my view was committed, and which had the effect, not unnaturally, of raising prejudices against the husband which he has had to regret all through the litigation.

But the broad question before Mr. *Cathcart* was whether his wife required, and by some form of procedure ought to receive, care and attention. To that question what answer can be reasonably given but one? She was under a constant belief that she was being poisoned. She was under a constant belief that persons and relatives, including her own mother, were in a conspiracy to poison her; that her mother had procured the murder of her father by bribing a groom to put a wrong bit in the mouth of a vicious horse, and that then a woman was employed to frighten the horse; that she was drugged within two months of her marriage to prevent her having an heir; that her husband was guilty of the grossest immorality with servants, and that her own mother was a party to unlawful operations upon the victims of his profligacy; and all this without a scintilla of fact to justify such atrocious accusations. If she was not mad in making them, she certainly could not be heard to complain that her own conduct and statements gave a not unreasonable belief in her insanity. These statements were brought to the knowledge of her husband's advisers long before the 8th of April, 1891.

It is obvious to ask, what was a husband to do under such circumstances? Was he to fold his hands in indifference to

C. A. 1892 *In re* CATHCART. Lord Halsbury.

such a state of things? If he did act at all, it was most certainly the right course in such a case as his to invoke the protection of the lunacy laws; and those laws, if properly appealed to, involve neither oppression nor cruelty, and certainly do not deserve the description which appears to have been given of them to the jury.

I do not desire to say anything of the verdict of the jury. It was a verdict of the majority, and they had the advantage of seeing and conversing with Mrs. *Cathcart*. It may be that upon the issue with which they had to deal—namely, whether at the time of inquisition found, Mrs. *Cathcart* was capable of managing herself and her property—the jury were right; but that does not decide the question whether for months and years before that time her conduct and demeanour had been such as to lead to the reasonable belief that she required to be put under some restraint. I think it unquestionably was so, and I have no doubt, therefore, that the order under appeal should be affirmed, and this appeal dismissed with costs.

There remain the other appeals as to the subsequent orders, ably and plausibly attacked by the learned counsel, Mr. *Norton*, but I have come to the conclusion that the orders are right.

It is true that the order which deals with charging orders, deals with them in such a way that for such orders no other course of procedure is permitted than that pointed out, and it is clear that in this case that form of procedure has not been followed. But the argument fails, I think, in this, that the order now under appeal is not a charging order within the meaning of Order XLVI., rule 1. It is true it may operate as a charging order, but it is obviously not the thing therein referred to. The 14th section of the *Judicature Act*, 1884, is quite wide in its terms, and I think it clear that the order originally made by the Lords Justices was within their jurisdiction to make, and equally clear that they had power to enforce it by the section in question passed nine years after the Orders of 1875, relied on as restricting the power of enforcing anything which may operate as a charge. I think, therefore, these appeals also should be dismissed with costs.

The Master of the Rolls and Lords Justices *Lopes* and *A. L. Smith* concur in this judgment, which is the judgment of the Court.

C. A. 1892 *In re* CATHCART.

Solicitors for Petitioner: *Crawley, Arnold & Co.*
Solicitors for Respondent: *Hood-Barrs & Co.*

A. M.

SNEATH *v.* VALLEY GOLD, LIMITED.

C. A. 1892 NORTH, J. *Dec.* 9. C. A. *Dec.* 14, 15.

[1892 S. 4584.]

Debenture-holders—Compromise—Meeting—Majority binding Minority—Notice —"Fourteen clear Days"—Arrangement to receive Shares instead of Debentures—Dissentient Minority.

A company issued a class of debentures which charged all its property, and it was provided that a meeting of debenture-holders should have power, by special resolution, "to sanction any modification or compromise of the rights of the debenture-holders against the company or against the property." The company afterwards transferred its assets to a new company subject to the debentures, and was dissolved. The new company in August, 1892, passed resolutions for voluntary winding up with a view to reconstruction. Its funds were exhausted, and its property consisted of certain mining rights in *California*, which would be forfeited unless fees to a considerable amount were paid by the end of 1892. A scheme was formed for a new company with a larger capital, as part of which scheme the debenture-holders were to accept ordinary shares in the new company instead of their debentures. This scheme was duly sanctioned by the shareholders, and was also sanctioned by a special resolution of a meeting of debenture-holders on the 31st of October, 1892. A dissentient debenture-holder brought his action to restrain the carrying out of this scheme, on the ground that it was beyond the powers of a meeting of debenture-holders to sanction it so as to bind any dissentient debenture-holders. *North*, J., refused an interlocutory injunction, on the ground that the Plaintiff was not damnified by the proceedings if they did not bind him:—

Held, by the Court of Appeal, the motion being treated as the trial, that the difficulty in the way of the debenture-holders enforcing their rights made the case one in which the power to compromise arose, and that this was a compromise of the rights of the debenture-holders against the property, which it was within the power of a meeting of debenture-holders to sanction by special resolution so as to bind the dissentient debenture-holders, and the action was dismissed.

But where under a similar power a resolution approving a similar scheme to exchange debentures for shares was passed by a body of debenture-

C. A.
1892
SNEATH
v.
VALLEY
GOLD,
LIMITED.

holders whose rights were undisputed and capable of being enforced without difficulty:—

Held, that the power to compromise had not arisen, and that the resolution did not bind a dissentient minority: *Mercantile Investment and General Trust Company* v. *International Company of Mexico* (1).

The question what is a "compromise" discussed.

An advertisement in the newspapers convening a meeting of debenture-holders under a trust deed is a sufficient notice, unless the deed expressly requires notice to be given by circular.

Notice "at least fourteen days before the date" of a meeting of debenture-holders means fourteen clear days between the issue of the advertisement or circular calling the meeting and the day of the meeting; and the notice so given is effectual, though it may not actually reach any debenture-holder until some days afterwards.

A COMPANY called the *Valley Gold Company, Limited*, was registered in 1886, with a nominal capital of £110,000, in £1 shares, for the purpose of working mines in *California*. The company had mining claims in that State, and it appeared that according to the local laws a certain amount of mining work must be done each year upon each claim until an application to the Government of the *United States* for a grant of the mines by letters patent had been made and accepted.

In 1889 the company issued a series of 1500 debentures for £10 each. By each of these debentures the company undertook to pay to the registered holder on the 1st of July, 1891, or on such earlier day as the same should become payable under the indorsed conditions, the sum of £10 for principal, and in the meantime to pay interest at £10 per cent. on the 1st of January and the 1st of July in each year, and also to pay on the 1st of July, 1891, the further sum of £1 by way of bonus or further interest, and the company charged with such payments all its property, present and future, except unpaid calls, and it was provided that the security should be a floating security.

The 2nd, 4th, and 6th conditions indorsed on the debentures were as follows:—"2. The debentures of the said series shall rank *pari passu* as a first charge on the property hereby charged without any preference or priority one over another. Part of the property has been conveyed, and the remainder will be forthwith conveyed, to trustees for the debenture-holders, and the company

(1) *Post*, p. 484, n.

and such trustees will, as soon as may be, execute a declaration of trust in the form already prepared, and for identification signed by the chairman of the company, and the holders of the debentures of the above issue are and will be entitled *pari passu* to the benefit of, and will be subject to, the provisions contained in the said form as fully and effectually to all intents and purposes as if the same had been executed by both parties prior to the issue hereof." "4. If the company makes default for a period of two calendar months in the payment of any interest hereby secured, or if an order of some Court of competent jurisdiction is made, or a special or extraordinary resolution is passed for the winding up of the company, or if a distress, execution, or attachment shall be levied or sued out, upon, or against the property or chattels of the company, the principal moneys hereby secured shall (subject to the provisions of the said trust deed) immediately become payable." "6. Nothing herein contained shall be taken to authorize the creation hereafter of any mortgage or charge on the property for the time being of the company in priority to the charge hereby created."

The form of declaration of trust referred to in the conditions, was expressed to be made between the *Valley Gold Company, Limited*, of the one part, and the Defendants *Griffin* and *Gardner* (therein called the trustees), of the other part, and thereby, after reciting that the several locations, mines, lands, mining, water, timber, and other rights, together with the building plant, machinery, stores, and all other the property and effects of the *Valley Gold Company, Limited*, in *Holcomb Valley, California*, had been or would forthwith be conveyed to the trustees absolutely, it was witnessed that the said trustees declared that they would hold the property so conveyed and intended to be conveyed as aforesaid, and all the patents granted or to be granted in respect thereof, upon the trusts therein expressed for the benefit of the debenture-holders, and it was thereby provided (clause 15) that the provisions contained in the schedule thereto should have effect in the same manner as if such provisions were therein set forth.

The schedule provided for the holding of meetings of debenture-holders. Clause 13 enabled a meeting by special resolution to

C. A. 1892 SNEATH v. VALLEY GOLD, LIMITED.

authorize the trustees, after making an entry on the property, to give up possession to the company. Clauses 14, 15, and 16 were as follows:—

"14. A general meeting of the debenture-holders shall in addition to the power hereinbefore given have the following powers exercisable by special resolution, viz. (1.) Power to sanction the release of any of the mortgaged premises; (2.) Power to sanction any modification or compromise of the rights of the debenture-holders against the company or against the property, whether such rights shall have arisen under the debentures or under these presents or otherwise.

"15. A special resolution passed at a general meeting of the debenture-holders duly convened and held in accordance with these presents shall be binding upon all the debenture-holders, whether present or not present at such meeting, and each of the debenture-holders shall be bound to give effect thereto accordingly.

"16. The expression 'special resolution,' when used in this schedule, means a resolution passed, at a meeting of the debenture-holders duly convened and held in accordance with the provisions herein contained, by a majority consisting of not less than three-fourths of the persons entitled to vote thereat. Provided that, in computing the majority when a poll is demanded, reference shall be had to the number of votes to which every such person is entitled under these presents."

On the 30th of June, 1890, the *Valley Gold Company* passed a special resolution, which was duly confirmed on the 16th of July, 1890, that the company should be wound up voluntarily, and that all its assets, subject to the debentures which it had issued, should be transferred to a new company called the *Valley Gold, Limited.* In July, 1890, the new company was registered. The affairs of the *Valley Gold Company* were wound up, its assets transferred to the new company, and sects. 142 and 143 of the *Companies Act*, 1862, were complied with. The return under sect. 143 was registered in May, 1892, so that the company was dissolved in August, 1892.

On the 29th of August, 1892, the *Valley Gold, Limited*, with a

view to reconstruction, passed a special resolution for voluntary winding up, and appointed a liquidator.

A scheme of reconstruction was proposed, the short effect of which was that the liquidator should sell and transfer to a new limited company all the assets of the company in the *United States*, except cash in hand or moneys due to the company. The nominal capital of the new company was to be £135,000, in 540,000 shares of 5*s.* each. The consideration for the transfer was to be the payment of £123,500 by the allotment to the liquidator or his nominees of 460,000 shares in the new company credited with 4*s.* 6*d.* per share paid thereon, and 80,000 fully paid-up shares, and the payment by the new company of such of the debts and liabilities of the company (other than debenture debt) as the assets in the hands of the liquidator might be insufficient to satisfy, and of any sums which might become payable to dissentient shareholders. Each ordinary shareholder in the old company was to be entitled, for each share in the old company which he held, to one share in the new company credited with 4*s.* 6*d.* paid, and each preference shareholder for each share held by him to one fully paid-up share in the new company. The 3rd clause of the scheme was as follows :—

"The liquidator shall also procure to be allotted to every registered holder of debentures of this company as his nominee forty fully paid ordinary shares of 5*s.* each for and in satisfaction of all claims for principal under each debenture of £10, and one such fully paid-up share for every 5*s.* due to such debenture-holder for interest calculated up to the date of the incorporation of the new company. Provided always, that until a sum exceeding 2*d.* per share shall have been called up upon the shares to be allotted with 4*s.* 6*d.* per share paid, the rights of the debenture-holders in respect of their debentures shall be deemed to be suspended. And if no call shall be made upon such partly-paid shares, beyond the sum of 2*d.* each, for a period of twelve months from the first allotment of such partly-paid shares, then the rights of the debenture-holders under their debentures shall immediately revive and become enforceable as if this scheme had never been accepted."

On the 31st of October, 1892, the shareholders passed extra-

C. A. 1892 SNEATH v. VALLEY GOLD, LIMITED.

ordinary resolutions for the reconstruction of the company according to the above scheme.

On the same day an adjourned general meeting of debenture-holders was held at which the following resolution was passed almost unanimously:—

"That this meeting of debenture-holders do hereby approve the several resolutions passed at the extraordinary general meetings of shareholders in *Valley Gold, Limited*, held this day, being a scheme for the reconstruction of the company, and hereby authorize the trustees for the debenture-holders to arrange for the exchange of debentures for shares in accordance with and subject to the terms of the said scheme."

The Plaintiff was trustee of the estate of *Ernest Zuccani*, against whom a receiving order in bankruptcy had been made. Part of the property of *Zuccani* consisted of twenty of the above-mentioned debentures. The action was commenced by the Plaintiff, on behalf of himself and the other debenture-holders, against the *Valley Gold, Limited*, and *Griffin* and *Gardner*, the trustees for the debenture-holders, to restrain the Defendants from carrying into effect the above scheme of reconstruction. The Plaintiff moved for an injunction.

The liquidator deposed that it was essential, in the interest both of the debenture-holders and the shareholders, that the scheme should be carried out, for that, unless money was ready before the end of December to pay the fees payable on the letters patent granting the mines, the right of the company to the mines would lapse, and that the company had not the money, nor could it be raised except by the scheme, as there was no uncalled capital, and the new company could not be formed unless the debenture-holders compromised their rights, for that no new company would take over the property subject to a debenture debt of £15,000 bearing interest at £10 per cent. Evidence by American lawyers was given shewing that the company's right to the mines would lapse if the fees were not paid before the end of 1892.

The motion was heard before Mr. Justice *North* on the 9th of December, 1892.

Cozens-Hardy, Q.C., and *George Henderson*, for the motion.

Everitt, Q.C., and *Kerly*, for the Defendants.

C. A. 1892 SNEATH v. VALLEY GOLD, LIMITED.

NORTH, J.:—

In this case a company named the *Valley Gold Company, Limited*, was formed, and certain debentures were issued by it, some of which are held by the Plaintiff, who sues on behalf of himself and the other debenture-holders. Subsequently the *Valley Gold, Limited*, was formed as a company and took over the assets of the *Valley Gold Company, Limited*, subject to the debentures. The *Valley Gold, Limited*, is in the throes of dissolution, and is being wound up, and resolutions have been passed for the sale of its property upon certain terms to a new company which has not yet been formed.

The question is whether the Plaintiff, as representing the debenture-holders of the *Valley Gold Company, Limited*, can interfere to restrain that sale from being carried into effect. In my opinion, he cannot. I do not think it necessary to go into the various matters which have been argued before me, my reason for saying that he cannot interfere being a very short one. The Plaintiff is not affected at all, unless he is bound by the resolution of the majority under the power created by the covering deed for securing the debentures. If the resolution, which is admitted to have been passed by the proper majority, was within the power of a general meeting, and the majority could bind the minority, it is admitted that the Plaintiff and all the other debenture-holders are bound. But if the resolution was not within the powers of the meeting, and does not bind the minority, then I am wholly at a loss to understand how a member of the minority is prejudiced by what is proposed to be done, and I am wholly at a loss to see what right he has to come here to interfere with proceedings by which he is not in any way bound. Either he is bound and cannot interfere, or is not bound and has no interest in interfering. In my opinion, this motion fails and must be dismissed.

The Plaintiff appealed, and it was agreed that the action should be treated as having come on for trial. C. A.

C. A.
1892
SNEATH v. VALLEY GOLD, LIMITED.

The appeal came on for hearing on the 14th of December, 1892.

Cozens-Hardy, Q.C., and *George Henderson*, for the appeal:—

We submit that the judgment of Mr. Justice *North* cannot be maintained. It has never before been held that a trustee is not to be restrained from doing an illegal act because the *cestui que trust* will not be bound by it if done. We are at all events entitled to a decision on the merits. We say that the arrangement proposed cannot be forced on a dissentient minority of debenture-holders. We submit that clause 14 of the schedule is no longer operative. The company which issued the debentures no longer exists, the debenture-holders are no longer creditors, and the powers given to a meeting by the original arrangement are no longer in force. But if clause 14 is still in force, we say that this case does not come within it. Consider the meaning of that clause. It is often desirable to release part of a mortgaged property from the security; so power is given to do that. Then power is given to sanction any modification or compromise of the rights of the debenture-holders. Modification does not include extinguishment, and by the proposed scheme the rights of the debenture-holders as holders of securities are taken away. Compromise implies a dispute, and there is here no dispute as to what the rights of the debenture-holders are; so this arrangement is not a compromise. The question what acts are within a power of this kind was discussed in *Follit* v. *Eddystone Granite Quarries* (1). The case of *Mercantile Investment and General Trust Company* v. *International Company of Mexico* (2) is closely

(1) [1892] 3 Ch. 75.
(2) C. A. June 19, 20; July 3, 1891.

[From Queen's Bench Division.]

MERCANTILE INVESTMENT AND GENERAL TRUST COMPANY *v.* INTERNATIONAL COMPANY OF MEXICO.

[1890 M. 98.]

APPEAL of Plaintiffs from judgment of Mr. Justice *Day*, at trial of action without a jury.

The Plaintiffs were holders of debentures in the Defendant company, which was an American company; and the question raised by the action was whether the Plaintiffs were bound by a resolution passed by a meeting of debenture-holders of the Defendant company—but to the passing of which resolution the Plaintiffs were not parties—for the exchange of the debentures of the Defendant company for preference shares in an

in point, and there a resolution was held to be *ultrà vires* which gave the debenture-holders shares in another company instead of their debentures.

English company to which the Defendant company had transferred all its assets. The resolution purported to be passed in pursuance of an arrangement made between the English company and the secretary to the committee of debenture-holders in the Defendant company, and which arrangement had been embodied in a deed of the 20th of September, 1889. The Plaintiffs denied the validity of the resolution altogether.

At the trial, Mr. Justice *Day* gave judgment for the Defendants, making a declaration that the resolution in question, and the arrangement embodied in the deed of the 20th of September, 1889, were binding on the Plaintiffs; that the Plaintiffs' rights and remedies as debenture-holders, whether against the lands and property referred to in the debentures and the original debenture trust deed, by which the debentures were secured on the lands and property of the Defendant company, or as against the Defendant company itself, were at an end, and that the debentures must be deemed to confer only a right to an allotment of preference shares in the English company in accordance with the deed of the 20th of September, 1889.

The Plaintiffs appealed.

The appeal was heard on the 19th and 20th of June, 1891.

The facts of the case are sufficiently stated in the judgment of Lord Justice *Lindley*.

Finlay, Q.C., *Buckley*, Q.C., and *C. C. Scott*, for the Appellants, cited *Reg.* v. *Justices of Shropshire* (8 A. & E. 173); *In re Alabama, New Orleans, Texas and Pacific Junction Railway Company* ([1891] 1 Ch. 213); *Hay* v. *Swedish and Norwegian Railway Company* (5 Times L. R. 460); *Miles* v. *New Zealand Alford Estate Company* (32 Ch. D. 266); *Cook* v. *Wright* (1 B. & S. 559); *In re Empire Mining Company* (44 Ch. D. 402); *Companies Act*, 1862, Table A, art. 95, 97.

Sir *H. Davey*, Q.C., and *Danckwerts*, for the Respondents, relied on the provisions of the deed of the 20th of September, 1889, and the *Joint Stock Companies Arrangement Act*, 1870, and cited *In re Alabama, New Orleans, Texas and Pacific Junction Railway Company* ([1891] 1 Ch. 237, 241, 243, 244, 246); *Slater* v. *Darlaston Steel and Iron Company* (W. N. (1877) 165); and *Palmer's* Company Precedents (5th Ed. p. 672 *et seq.*).

Finlay, in reply.

1891. July 3. LINDLEY, L.J.:—

This is an action brought by the holders of 125 debentures issued by the Defendants, and the object of the action is to recover interest due on them. The Defendant company defended the action upon the ground that a majority of the debenture-holders resolved that the debentures of the company should be exchanged for paid-up preference shares in another company which has taken over the assets and liabilities of the Defendant company; and the Defendant company contend that this resolution is binding upon the Plaintiffs, and that the Plaintiffs' rights as debenture-holders have ceased and determined. The Plaintiffs deny the validity of the resolution; and they do so on

C. A.
1892
SNEATH
v.
VALLEY GOLD, LIMITED.

Everitt, Q.C., and *Kerly*, for the Defendants:—

The company which issued the debentures is dissolved; so the two grounds, viz., first, that it was *ultrà vires* and not binding on dissentient debenture-holders; and, secondly, that it was passed at a meeting not duly convened.

In order to decide the questions thus raised, it is necessary to ascertain, first, the terms on which the debentures were issued; secondly, the position of affairs when the resolution was passed; and, thirdly, the mode in which the meeting which passed it was convened.

First, as to the terms on which the debentures were issued. The Defendant company is an American company, incorporated by the State of *Connecticut*. Its objects were to buy and sell land in the Republic of *Mexico*, and it did in fact acquire 17,500,000 acres of land in that part of the Republic known as *Lower California*. The company had power to borrow money and to issue debentures on the security of this land; and the company exercised this power and issued debentures, some of which are held by the Plaintiffs.

Each debenture is for 500 dollars, payable to the bearer or to the registered holder thereof; and it contains a promise by the company to pay the principal sum and also interest at 6 per cent. half-yearly. Each debenture was issued subject to the conditions indorsed upon it; and the debenture-holder was declared to be entitled to the benefit of, and to be subject to the provisions of, a trust deed of the 10th of March, 1888, which is the most important document in the case. I do not think there is any clause of that deed necessary for me to read or refer to on the present occasion, except the 21st 22nd, 23rd, and 24th. I do not mean by that that the other clauses are immaterial, because they do throw a good deal of light on the construction of the clauses I am about to read.

The deed appoints a committee of debenture-holders; and then clause 21 runs thus: "The committee may from time to time, whenever they shall think fit, convene a meeting of the debenture-holders to be held in the City of *London*. The notice convening the meeting shall state the business to be transacted thereat, and shall be given at least fourteen days before the date at which the meeting is to be held; and every such meeting shall be presided over by a member of the committee; and in case any members thereof shall not be present, then the debenture-holders present shall elect one of their number to preside; and subject to any special provisions herein contained, the meetings of the debenture-holders shall be conducted, as nearly as the circumstances of the case permit, in a manner applicable to the meetings of the shareholders of a company incorporated under the *Companies Act*, 25 & 26 Vict. c. 89, and having for its regulation the provisions contained in the table marked A in the 1st schedule to the said Act."

Then clause 22 says (and this is the most important clause of the whole): "A meeting of debenture-holders shall, in addition to any other powers hereby given, have the following powers, exercisable by special resolution, namely: (1.) Power at any time after such entry as aforesaid" (that is, entry by the trustee of the deed for breach of any

relation of debtor and creditor does not exist. The debenture-holders have a lien on the assets, but no personal demand against

---

of its provisions) "to give authority to the trustee to give up possession of the said lands to the company, either unconditionally or upon any conditions that may be arranged between the company and the committee with the sanction of a special resolution. (2.) Power to sanction the release of any of the mortgaged premises. (3.) Power to sanction any modification or compromise of the rights of debenture-holders against the company or against its property, whether such rights shall arise under the debentures or under these presents." And then clause 23 provides what a "special resolution" means, and I think I need not read that. Then clause 24 merely says that a special resolution shall bind all the debenture-holders.

These being the terms on which the debentures were issued, the next matter for consideration is the position of affairs when the resolution was passed.

In the year 1889 an English company was formed called the *Mexican Land and Colonization Company*. The objects of this company, as stated in its memorandum of association, were extraordinarily wide, and empowered the company not only to buy and sell land, but to carry on almost every business imaginable, including all kinds of commerce, banking, and promotion of companies.

On the 4th of May, 1889, the Defendant company transferred all its assets and its business and liabilities to this English company, subject, as to the lands in *Lower California*, to the debentures, and to the above-mentioned deed of the 10th of March, 1888. The consideration for these transfers consisted of fully paid-up shares in the English company, and a covenant against the liabilities of the Defendant company. The effect of this was to leave the Defendant company liable to pay the principal moneys and interest on its debentures, but to deprive it of its means of paying them except through the English company, and by enforcing that company's covenant of indemnity. The paid-up shares of the English company given to the Defendant company would be assets in its hands, but what has become of them there is no evidence to shew.

The debenture-holders did not become creditors of the English company, although they had a charge on the land in *California* transferred to that company; and, in the absence of evidence to the contrary, it must be assumed that the debenture-holders could have enforced their security against those lands after the transfer to the English company as effectually as they could before. There is no evidence to shew that the debenture-holders had any difficulty in obtaining the interest on their debentures, nor that such interest would not have been paid, in fact, regularly if matters had been left as they stood.

In this state of affairs it appears that the English company became desirous that the debenture-holders should exchange their debentures for first fully paid-up preference shares in that company; and on the 20th of September, 1889, a deed was executed between the English company and Mr. *W. E. Strickland* (the secretary to the committee of the debenture-holders) for carrying a proposal for the purpose into effect. It appears from the facts, as recited in that deed, that the English company was desirous

C. A. 1892

SNEATH v. VALLEY GOLD, LIMITED.

any one. We say that the proposed arrangement is a modification, and as such, within the power given by clause 14, it is a

---

that the holders of debentures in the Defendant company should exchange the same for first preference shares in the English company. Accordingly the deed, after providing that the proposal should be approved by special resolution at a meeting of the debenture-holders, and that immediately after the passing of the resolution all necessary things should be done for releasing the lands comprised in the debenture trust deed from the charge of the debentures, and that the English company would increase its capital by the creation of first preference shares, proceeded as follows:—Clause (6): "Upon the said land and property charged as aforesaid by the said debentures being released to the English company as herein provided, the English company shall allot to every debenture-holder surrendering his debentures, with all outstanding coupons attached, first preference shares of the said issue," according to certain rates.

In order to carry out this scheme, the debenture-holders' committee caused advertisements to be issued in the *London* newspapers on the 23rd of September, 1889, calling a meeting of debenture-holders in *London* for the 8th of October, 1889; and on that day a meeting was held, and the special resolution, the validity of which is in question, was passed. No poll was demanded, and the resolution was passed by the majority necessary to make it binding, if the resolution was *intrà vires* and if the meeting was duly convened. The resolution itself was as follows: "That all rights of the debenture-holders of the *International Company of Mexico*" (that is, the Defendants), "whether against its property or against the company, be compromised by the acceptance in lieu of such debentures and the coupons accrued and not due, and in discharge of such rights, fully paid 6 per cent. cumulative preference shares (entitled to dividend as from the 1st of July, 1889) in the *Mexican Land and Colonization Company, Limited*, at the rate of £110 in shares for every 500 dollars in debentures, in accordance with the proposal dated the 20th of September, 1889, and that the deed dated the 20th of September, 1889" (that is the one I have just referred to) "between the company and Mr. *W. E. Strickland*, referred to in such proposal, be approved and confirmed and be forthwith carried into effect."

It will be convenient now to explain the objections to the regularity of the meeting: first, it was said that the notice was not properly given by advertisement only, and that circulars should have been sent at least to registered holders. But there is no provision to this effect in the conditions indorsed on the debentures, nor in the deed of the 10th of March, 1888, nor, so far as we know, anywhere else. Moreover, the secretary to the committee of debenture-holders, Mr. *Strickland*, stated that he did issue circulars to all debenture-holders whose names were known, and that these circulars were sent out about eighteen days before the meeting. Under these circumstances, in the absence of any express provision on the subject, the notice by advertisement must be held sufficient, and no other notice could have been given to the bearers of the debentures, and notice by advertisement is the mode in which notice in such cases is usually given in business.

Next, it was said that the interval

modification of the rights of the debenture-holders against the assets. The matter is one of life and death to the company; for

between the giving of the notice and the holding of the meeting was too short. The Plaintiffs' contention that "at least fourteen days" meant fourteen clear days was well founded; but there are fourteen clear days between the 23rd of September and the 8th of October. It was, however, argued that the notice, although advertised on the 23rd of September, ought not to be held to have been given on that day, because it probably could not or would not reach the debenture-holders for some time afterwards; and we were pressed to say that notice cannot be said to be given to a person until the notice reaches him, or, at all events, would reach him but for his own default. To give effect to this contention in a case of this kind would, however, render it impossible to calculate the period of fourteen days, and would render that limit nugatory. The holders of these debentures may be scattered all over the world, and, their residence being unknown, it would be impracticable to fix beforehand when any meeting could be held. This contention, therefore, must be rejected, and, for the reasons given above, the notice convening the meeting must be held to be sufficient.

The main question, however, is, whether the resolution is one by which it was competent for a majority of debenture-holders to bind a dissentient minority. This must depend upon the true construction of the 22nd clause of the deed of the 10th of March, 1888; and, in order to arrive at that construction, attention must be paid, not only to the language of the clause, but to the objects to attain which the clause itself was inserted.

Powers given to majorities to bind minorities are always liable to abuse; and, whilst full effect ought to be given to them in cases clearly falling within them, ambiguities of language ought not to be taken advantage of to strengthen them and make them applicable to cases not included in those which they were apparently intended to meet. To take the language of the clause—"the power to release the mortgaged premises" does not include a power to release the Defendant company. The power to modify the rights of the debenture-holders against the company does not include a power to relinquish all their rights. A power to compromise their rights presupposes some dispute about them or difficulties in enforcing them, and does not include a power to exchange their debentures for shares in another company, where there is no such dispute or difficulty. It is a mistake to suppose that a power to compromise a claim for money becomes a power to accept less than 20s. in the pound, if the debt is undisputed and the debtor can pay. A power to compromise does not include a power to make presents. The learned Judge in the Court below assumed that the majority could have bound the minority to take less than they were entitled to; and he came to the conclusion that the majority could bind the minority to exchange their debentures for the preference shares in the English company. The assumption which he made appears to me inaccurate under the circumstances with which we have to deal. The words themselves of the power conferred on the majority of the debenture-holders are, in my opinion, not sufficient to warrant what was done.

C. A. 1892

SNEATH v. VALLEY GOLD, LIMITED.

if money is not raised, which it will not be unless this scheme is passed, the mining rights will be forfeited, all the past expendi-

If we look further at the object of the power it becomes still more plain that what has been done cannot be supported. I infer from the materials before us, and especially from the deed of the 20th of September, 1889, and from the evidence in the case, that the English company and some of the debenture-holders started this scheme, and that it was prosecuted and carried through in the interests of that company and of those who intended to join it. The resolution was passed simply because those debenture-holders who voted for it thought it would be better in a commercial sense for all debenture-holders if they exchanged their debentures for preference shares in the English company. There was no other reason for not leaving them alone; their rights were in no peril. Assuming therefore, as I do, that the majority of the debenture-holders present at the meeting acted honestly and did what they thought best under the circumstances, I think that those circumstances were not such as to bring the power into play, and that, on this ground also, what they did cannot bind the absentees or dissentients.

For these reasons the appeal must be allowed. Instead of the declaration in the judgment appealed from, it must be declared that the resolution of the 8th of October, 1889, was invalid, and is not binding on the Plaintiffs, and judgment must be entered for the Plaintiffs with costs here and below.

FRY, L.J.:—

The Plaintiffs were debenture-holders in an American company, and their rights were defined, partly by the debentures themselves, and partly by a collateral deed. At the date of the resolution in question the Plaintiffs, as debenture-holders, were entitled to, first, the personal obligation of the American company to pay principal and interest, and, secondly, the benefit of a mortgage of certain lands in *Lower California*.

The result of the resolution in question, if valid, is to extinguish both these rights, and in fact all rights against the American company and its property, and to substitute for them the rights of a preference shareholder in an English company which had been formed. The holders of the debentures would cease to have any security or any right to recover principal or interest, and would in exchange become entitled to a preferential share of the divisible profits of the new company. That new company had acquired, not only the property subjected to the mortgage of the American company, but other properties of that company not charged to the debenture-holders; and the right of the preference shareholders would be confined to a right to share in the profits of the entire company and to an interest, in case of dissolution, in its surplus assets.

Is this transaction a modification or compromise of the rights of the debenture-holders against the American company or against its property? If this question be answered in the affirmative, the Defendants are right; if in the negative, the Plaintiffs.

In my opinion, the transaction embodied in the resolution is not a modification of the rights of the debenture-holders against the company or their property; it is the extinction of all their rights against the com-

ture will be utterly lost, and there will not be a farthing for anybody. The judgment of Lord Justice *Lindley* in the *Mercantile Investment and General Trust Company* v. *International Company of Mexico* (1) leaves untouched a case like this where there is a pressing necessity, and "difficulty" in enforcing the rights is there suggested as a ground for bringing the power into operation. This scheme, moreover, comes under the head of compromise: a company which is not very flourishing has bought

pany or its property. A right to share in profits produced by a business in which the mortgaged property may be used as a part, and part only, of the profit-producing undertaking, is not a right against that property.

Furthermore, in my opinion, this transaction is not a compromise of these rights. In our older legal language the word "compromise" appears to have been used, in accordance with its etymology, to express the mutual promises of "persons at controversy" to submit to the arbitrament of a third person the matters in dispute between the two (see "A compromise defined," 2 West Symboleography, 163). In our present language it undoubtedly embraces an agreement between two or more persons for the ascertainment of their rights when there is some question in controversy between them or some difficulty in the enforcement to the uttermost farthing of the rights of the claimant. But, in my opinion, the word is applicable only where there is some such controversy or some such difficulty. Nothing of the sort existed in the present case. In my opinion, the power to compromise does not include the power to give up one *chose in action*, namely, a secured debenture, in exchange for another *chose in action* of a totally different kind, namely, a preference share, in the absence of all dispute as to the rights of the creditor, of all difficulty in enforcing those rights, and of any suggestion that the full fruits of these rights could not be obtained. Such a transaction might be described as an exchange, possibly as a barter, or an arrangement; but it is, in my opinion, not a compromise of the rights against the old company.

I have hitherto referred only to the particular language of the clause of the deed which requires interpretation. There is, in my opinion, nothing in the other parts of the deed, or in its general scope and object, to modify or extend the natural and ordinary meaning of the clause in question.

None of the cases cited, all of which deal with very different language, appears to me to throw any light on the inquiry.

I concur in what has been said by the Lord Justice as regards the sufficiency of the notice for the meeting.

For these reasons, I am of opinion that this appeal should be allowed, and judgment given for the Plaintiffs, with costs down to and including the appeal.

LINDLEY, L.J.:—

I should say that Lord Justice *Bowen* agrees.

Solicitors: *Badham & Williams*; *Norton, Rose, Norton, & Co.*

G. I. F. C.

(1) *Ante*, p. 484, n.

C. A. 1892 SNEATH v. VALLEY GOLD, LIMITED.

the mortgaged property, and this is a compromise between the debenture-holders and the owners of the equity of redemption. "Compromise" extends to many things: it is not confined to a litigation; clause 14 speaks of a compromise of rights. Under the *Joint Stock Companies Arrangement Act*, 1870, which authorizes schemes of "arrangement or compromise," it was held, in *In re Empire Mining Company* (1), that what is being done here could be done, and this decision was approved by the Court of Appeal in *In re Alabama, New Orleans, Texas and Pacific Junction Railway Company* (2). The words in clause 14 are not the same as those in the Act; but we submit there is no substantial difference; and in *In re Dominion of Canada Freehold Estate and Timber Company* (3) Mr. Justice *Chitty* draws an analogy between the provisions of the Act and clauses of this nature in a deed.

Cozens-Hardy, in reply:—

[LINDLEY, L.J.:—This is not a compromise of a litigation; but may it not be good as the compromise of a right?]

That was dealt with in the *Mercantile Investment and General Trust Company* v. *International Company of Mexico* (4). There must be a dispute about the rights or a difficulty in enforcing them; the rights of the debenture-holders here are clear, and it is not suggested in the affidavits that there is any difficulty in their enforcing them.

[THE COURT intimated that there appeared to be great difficulty in doing so.]

Then as to "compromise," that word does not include extinction. The Act of 1870 contains the word "arrangement," which is wider than compromise, so that cases under that statute do not govern the present case.

LINDLEY, L.J. (after stating the facts of the case and reading the material clauses of the conditions and schedule, proceeded):—

In July, 1890, the original company which issued these deben-

(1) 44 Ch. D. 402.
(2) [1891] 1 Ch. 213, 237.
(3) 55 L. T. (N.S.) 347.
(4) *Ante*, p. 484, n.

C. A.
1892
SNEATH
v.
VALLEY GOLD, LIMITED.
Lindley, L.J.

tures was wound up. The present company which is now being wound up became the owners of the assets of the original company, subject to the debentures, *i.e.*, the company became assignees of an equity of redemption. The original company was dissolved in August, 1892; so there is no longer any power to sue on the covenants to pay contained in the debentures.

The property of the company consists of rights to obtain certain mining grants which have not yet been completed. The debenture-holders say to the company: "It is true that you are not our debtors, but we will enforce our charge on your property if you do not pay us." The company reply: "We are unable to pay you, and, unless some further money is paid before the 31st of December, the concessions will be lost, and there will be nothing for anybody. It is proposed to form a new company, and to raise money enough to pay the fees for obtaining the mining grants and to work the mines. No such company can be formed if the assets are to remain subject to a mortgage debt of £15,000, carrying interest at £10 per cent.; but it can be found if you debenture-holders will accept shares instead of debentures." This proposal was submitted to the debenture-holders at a meeting duly called for the purpose, and they almost unanimously resolved to accept it, being of opinion that they have not a ghost of a chance of getting anything except by this scheme. One debenture-holder, however, brings an action to prevent the carrying out of this scheme as being *ultrà vires*. He says: "This is not within the powers given by clause 14 of the schedule; a dissenting debenture-holder, therefore, is not bound, and I object to this scheme being carried out." Mr. Justice *North* decided against the Plaintiff, on the ground that if the resolution was not *ultrà vires* the Plaintiff was bound, and that if it was *ultrà vires* the Plaintiff was not bound, and had no right to interfere with proceedings which did not bind him. I cannot agree with him in this view of the case. But I think that his order was right, because under the circumstances of this case a difficulty had arisen which brought into operation the powers given by clause 14 of the schedule to sanction a modification or compromise of the rights of the debenture-holders, and that this scheme comes within those powers. The *ratio decidendi*

C. A. 1892 SNEATH v. VALLEY GOLD, LIMITED. Lindley, L.J.

in the *Mercantile Investment and General Trust Company* v. *International Company of Mexico* (1) was that there was no such dispute or difficulty as to bring the power of compromising into play. Here it is true that there is no pending litigation; but that is not necessary: all that is required is a difficulty which cannot be got over without some arrangement. It has been urged, that as the original company is dissolved the power is at an end; but it would be a very narrow construction to hold that, because the debtor is extinct, powers given to the creditors are at an end. Those powers are just as much wanted for dealing with the assignees of the equity of redemption as for dealing with the original mortgagor. I think this scheme was a compromise which the requisite majority of debenture-holders had power to sanction. The action, therefore, will be dismissed.

LOPES, L.J.:—

I have nothing to add. I think the case comes within the power of compromising contained in clause 14.

KAY, L.J.:—

I agree, and have but little to add. The company which is in liquidation is owner of the equity of redemption in the property, subject to the debentures: the debenture-holders have lost their claim as creditors against the company, their only right is against the property charged by the debentures. The power given by clause 14 is a power of compromising rights, either against the original company or against the property, and cannot be regarded as gone because the company which issued the debentures has been dissolved. Power was given to the debenture-holders in meeting to compromise their rights, and as long as they have rights that power must continue. The clause authorizes a meeting of debenture-holders to compromise the rights of the debenture-holders against the company or against the property; the former branch of this power is gone, but the latter exists as long as they have any rights against the property. The clause does not say that the meeting is to have power to compromise litigation, or to compromise disputes, but

(1) *Ante*, p. 484, n.

C. A. 1892 SNEATH v. VALLEY GOLD, LIMITED. Kay, L.J.

to compromise rights. The rights of the debenture-holders were to take proceedings against the property comprised in their securities. See what the position of that property is. Substantially the whole of it will be forfeited unless a sum of money is paid by the 31st of December. The debenture-holders will not pay it, but at a meeting they resolve to accept the terms of an arrangement that a new company shall be formed which will provide money to pay this sum and to carry on the working of the mines, and that the debenture-holders shall have shares in the new company in lieu of their debentures. Is not that a compromise of their rights against the property? Mr. *Cozens-Hardy* has not been able to persuade me that it is not. His argument would go to this, that a scheme by which the debenture-holders were to accept debentures from the new company instead of their present ones would not be a compromise. In *In re Empire Mining Company* (1) and *In re Alabama, New Orleans, Texas and Pacific Junction Railway Company* (2) a difficulty in enforcing rights was held sufficient to authorize a compromise by which they were varied. The appeal will be dismissed with costs.

Solicitors: *Cheston & Sons; Kerly, Son, & Verden.*

H. C. J.

In re DENVER HOTEL COMPANY.

C. A. 1892 NORTH, J. *Dec.* 17. C. A. *Dec.* 19. 1893 *Jan.* 14.

Company—Reduction of Capital—Extinguishment of Shares—Confirmation by the Court—Dissentient Shareholders—Companies Acts, 1867 (30 & 31 *Vict. c.* 131), *s.* 9 [*Revised Ed. Statutes, vol. xv., p.* 624]; *and* 1877 (40 & 41 *Vict. c.* 26), *s.* 3 [*Revised Ed. Statutes, vol. xviii., p.* 367].

A company, under its articles of association, was forbidden to purchase its own shares, but had power to reduce its capital and to accept surrenders of its shares, which were fully paid up. This company having two hotels, of which one was a valuable asset and the other was held under an onerous lease, entered into an arrangement with certain of its shareholders which was, in substance, that the company should sell the lease and goodwill and furniture and stores of the leasehold hotel, and that the purchasing shareholders should pay £3000 to the company for the furniture, stores, and goodwill of the hotel, and should take upon themselves the

(1) 44 Ch. D. 402. (2) [1891] 1 Ch. 213.

C. A.
1893
In re DENVER HOTEL COMPANY.

obligations of the company under the lease of the hotel, and indemnify them against loss in respect of the hotel. And it was part of the arrangement that such shareholders should surrender their shares to the company, and that the capital of the company should be reduced to the extent of such shares.

In pursuance of this arrangement the company passed a special resolution that the nominal capital of the company should be reduced by paying off the capital represented by the shares of such shareholders, and by extinguishing the liability thereon. All the creditors assented to, no shareholder dissented from the arrangement and the special resolution; and the arrangement was beneficial to the company. Upon a petition by the company for the confirmation by the Court of the special resolution:—

Held, by the Court of Appeal, (1.) that the transaction was not a purchase by the company of its own shares, but a sale of some of its assets for less than their cash value in consideration of a release from heavy burdens, and of a surrender of shares for which the company parted with no saleable asset; (2.) that the sanction of the Court was not required except for the treatment of the shares when surrendered as permanently extinguished; and (3.) that the application being, in effect, merely one to authorize the company to reduce its nominal capital to the extent of shares which it would not want when the sale had been carried out, ought to be granted; and *held*, accordingly, that the proposed reduction of capital should be sanctioned.

The decision of *North*, J., reversed.

Trevor v. *Whitworth* (1) observed upon.

APPEAL from Mr. Justice *North*.

This was a petition for the confirmation by the Court of a special resolution passed by a company for a reduction of its capital under the following circumstances.

The *Denver Hotel Company, Limited*, which was registered under the *Companies Acts*, 1862 to 1889, in November, 1889, was formed for the purposes, amongst others, of purchasing the *Windsor Hotel* in *Denver*, in the State of *Colorado*, in the *United States* of *America*, and of carrying on the business of hotel proprietors, with power to take on lease or acquire other real and personal property suitable for its business. The original capital of the company was £130,000, divided into 26,000 shares of £5 each. The material provisions of the articles of association were as follows:—

Art. 4. "The 13,000 shares of the original capital numbered 1 to 13,000 inclusive shall be preference shares, and the 13,000 shares numbered 13,001 to 26,000 inclusive shall be ordinary

(1) 12 App. Cas. 409, 436, 438.

shares. In the event of the winding up of the company the holders of the preference shares shall be entitled to receive in full out of the assets of the company the amounts paid up on such shares in priority to the claims of the holders of the ordinary shares to be paid any amount in respect of such shares, and in the event of the capital being written off on a reduction of capital, amounts paid or credited on the ordinary shares shall be written off before the amounts paid or credited on the preference shares. Each class of shares shall respectively be entitled to rank for the purposes of dividend in the manner hereinafter declared."

Art. 9. "The funds of the company shall not be expended in the purchase of or lent upon the security of its own shares."

Art. 27. "The directors may at any time accept a surrender of a share or shares on such terms and conditions as they may think fit. Any share or shares so surrendered may be disposed of in the same manner as a forfeited share."

Art. 45. "The company may in general meeting reduce its capital by paying off capital, cancelling capital which has been lost or is unrepresented by available assets, reducing the liability on the shares, cancelling shares not taken or agreed to be taken by any person, or otherwise, as may seem expedient, and capital may be paid off upon the footing that it may be called up again or otherwise."

The circumstances which rendered a reduction of the company's capital desirable were shortly as follows:—

The company on its incorporation acquired the *Windsor Hotel*, and they successfully carried on business therein, and paid substantial dividends to their shareholders up to the year 1892.

In or about the month of May, 1891, they took on lease a second hotel in *Denver*, called the *Metropole Hotel*, and in order to assist in defraying the cost of fitting, furnishing, and establishing this second hotel, the company increased its capital by the creation of 5000 new ordinary shares of £5 each. Of these new shares 3474 were issued and were fully paid up, so that the total subscribed capital amounted to £147,370. The company had issued debentures payable to bearer to the amount of £65,000, and debentures to registered holders to the amount of £10,000,

C. A. 1893 *In re* DENVER HOTEL COMPANY.

all of which were outstanding, so that the aggregate amount of their debenture debt was £75,000; but they had very few creditors besides the holders of their debentures. Upon the *Metropole Hotel* they had expended upwards of £23,000. The fitting and furnishing of the *Metropole Hotel* was placed in the hands of Mr. *W. H. Bush*, the company's managing director in *Denver*, who largely exceeded the expenditure prescribed by the board. There was no substantial increase in the company's business by reason of their having started a second hotel, and the *Metropole Hotel* was worked at a loss. In consequence of the excessive expenditure upon the *Metropole Hotel*, questions arose between the company and Mr. *Bush*, its managing director, who was one of the lessors, and it had been agreed, provisionally upon the resolution hereinafter mentioned being confirmed, that he and the holders of the shares mentioned in that resolution would take over the *Metropole Hotel* and furniture at cost price on having the shares held by them extinguished and the capital paid thereon set off as against the purchase price.

It was stated in the petition that this proposal, if carried out, would be a very beneficial one, and would avoid a considerable loss, and that on relinquishing the *Metropole Hotel* the capital proposed to be extinguished would be in excess of the company's wants. The lease of the *Metropole Hotel* was an onerous one, and the furniture and fittings would not, according to estimate, realize if sold anything approaching the £23,000 which the company had expended upon that hotel.

Under these circumstances an agreement dated the 8th of March, 1892, was entered into between the company and Mr. *W. H. Bush*, the material provisions of which were as follows:—

"(1.) The company shall deliver over to the said *W. H. Bush* possession of the hotel, situate in the city of *Denver*, and known as the *Metropole Hotel*, together with the furniture, fittings, household effects, and other chattels of the company, now being in or about the same. (2.) The said *W. H. Bush* shall carry on the said hotel as heretofore as a first-class hotel on the English system, and shall keep the building and the said furniture and effects duly insured against fire, and will pay all rent, taxes, and other outgoings in respect of the said hotel, and all municipal

and other taxes, and will pay all debts incurred in carrying on the same, and will not do or suffer anything to be done whereby the lease of the said hotel may become forfeitable or whereby any of the said furniture or effects may be liable to be taken in execution. (3.) The directors of the company will forthwith take all necessary steps to obtain from the shareholders the necessary resolutions for reducing the capital of the company by writing off the £23,710 of fully paid ordinary shares being those numbered 25,001 to 26,000, 20,031 to 20,080, 17,531 to 17,730, 22,554 to 22,587, 17,731 to 20,030, 28,046 to 28,645, 22,154 to 22,553, and 28,646 to 28,803 inclusive, standing in the name of *W. H. Bush* and his associates; and, if and so soon as such reduction is confirmed by the High Court of Justice in *England* will make over to the said *W. H. Bush* by bill of sale the fittings, furniture, and effects belonging to the company in or about the said *Metropole Hotel*, in full discharge of all money paid up upon and all other claims and demands whatsoever of the registered holders in respect of the shares above mentioned, which shall thereupon be extinguished, the said *W. H. Bush* procuring all proper discharges for the same. (4.) If the said resolutions shall be confirmed as aforesaid, the said hotel shall be deemed to have been carried on as from the 1st of February, 1892, for and on account of the said *W. H. Bush*, and the accounts between him and the company shall be adjusted on that basis, he being debited with all rents, taxes, wages, and other outgoings, and being credited with all receipts, provided that the said *W. H. Bush* shall in that event pay to the company as and for the stores upon the said premises and the goodwill of the business the sum of $15,000, such sum not being intended to be covered by the extinguishment of the said shares, and to be paid as to $5000 in cash, as to $,5000 by note of the said *W. H. Bush* at six months' date, and carrying interest at 7 per cent. per annum, and as to the balance by a like note at 12 months' date, such notes to be acceptable for discount to the company's bankers in *Colorado*, without recourse upon the company."

At a general meeting of the company held on the 30th of March, 1892, the following resolution was passed unanimously: "That the conditions contained in the memorandum of association of

C. A. 1893 *In re* DENVER HOTEL COMPANY.

the company be modified by reducing the capital from £155,000 divided into 31,000 shares of £5 each, by paying off the capital represented by the following 4742 ordinary shares of the company—that is to say, the shares numbered 17,531 to 20,080, 22,154 to 22,587, 25,001 to 26,000, and 28,046 to 28,803 inclusive (such capital being in excess of the wants of the company), and by extinguishing altogether the liability thereon so that the capital may, as reduced, consist of £131,290, divided into 26,258 shares of £5 each."

At this meeting there were present, either personally or by proxy, holders of 19,995 shares in the company of the nominal value of £99,975, in addition to the 4742 shares which were the subject of the resolution, so that 24,737 shares of the nominal value of £123,685 out of the total number 29,474 shares of the nominal value of £147,370 were represented.

At a second general meeting of the company held on the 14th of April, 1892, the above-mentioned resolution was duly confirmed as a special resolution.

No shareholder had dissented from this resolution, and the debenture-holders and the other creditors had either been paid or had assented to it.

The company presented this petition for the confirmation by the Court of the above-mentioned resolution. There was no opposition to the petition, and it came on for hearing before Mr. Justice *North* on the 17th of December, 1892.

Cozens-Hardy, Q.C., and *Kirby*, for the company:—

The resolutions were carried unanimously at the meetings. There are, in substance, no creditors who have not been paid or who do not assent to the proposed reduction. There are no actually dissentient shareholders, though there are some who have not expressed their assent. The Court has power, under sect. 3 of the Act of 1877, to sanction a reduction of part only of the capital of a company: *In re Quebrada Railway, Land and Copper Company* (1). The shares in question being fully paid up, there will be no diminution of liability to creditors.

[NORTH, J., referred to *In re Gatling Gun, Limited* (2).]

(1) 40 Ch. D. 363. (2) 43 Ch. D. 628.

In that case the vendor of patents to the company was making a gift to the company by surrendering some of the shares which had been given to him as the price of the patents. In the present case there is a compromise which is beneficial to the company.

[NORTH, J.:—Is not the proposed arrangement in effect a purchase by the company of its own shares?]

No. But if it is, the Court has power to sanction it under sect. 3. The judgment of Lord *Macnaghten* in *Trevor* v. *Whitworth* (1) shews this. The shareholders whose shares are to be extinguished consent. The transaction is within sect. 3, as a payment off of capital which is "in excess of the wants of the company."

Mushet, for the shareholders whose shares it was proposed to extinguish, consented to the petition.

NORTH, J.:—

I do not see my way to confirm the resolution. I am asked to sanction a reduction of the capital of the company, which it is proposed to effect by paying off capital which is in excess of the wants of the company.

It is proposed to pay off a certain number of the shares, which represent an amount of capital which it is said is not required for the purposes of the company. I do not see how I can sanction the payment off of that capital to some only of the shareholders without the consent of all the others. The result would be that some of them would be preferred by being paid off without any similar provision being made for the others, who stand in exactly the same position. If all the shareholders had assented, I should have had no difficulty about it; but a considerable number of them have not given their consent. I do not say that they dissent, but their consent has not been given, and they are about one-seventh of the whole number of shareholders—a very appreciable proportion. If capital is to be

(1) 12 App. Cas. 409, 436, 438.

C. A. 1893 *In re* DENVER HOTEL COMPANY. North, J.

returned, I do not see that it would be right to divide it amongst some of the shareholders to the exclusion of the others, who occupy precisely the same position in relation to the company as those who are to receive the returned capital.

It is said that my decision in *In re Quebrada Railway, Land and Copper Company* (1) is in point. There I sanctioned the repayment of capital to part of a class of shareholders without the consent of the rest. In many cases, however, the maxim, "*De minimis non curat lex*" has been held to apply. In the *Quebrada Case* the non-assenting minority was so small in number, and, moreover, their interests were so small in amount (they were affected to the extent of only one penny in the pound), that I thought I could sanction what I considered a beneficial arrangement, notwithstanding that an infinitesimal proportion of the shareholders was not represented. In the present case I have not to deal with an infinitesimal proportion of non-assenting shareholders: they are really about one-seventh of the whole. That being so, I do not see how I can give my sanction in this case.

It is said that the logical result of my decision in the *Quebrada Case* is that I ought to sanction what is now proposed. I do not think that is the logical result; but, if it be so, I think my decision in the *Quebrada Case* must have been wrong. I do not think it was wrong. But, having regard to the amount of the interest of the non-assenting shareholders here, I think I cannot extend that decision to the present case.

The proposed arrangement seems to me a beneficial one, and I should be prepared to sanction it, if I thought I had power to do so under the Act; but I do not think I have. Therefore, I must dismiss the petition.

W. L. C.

C. A.

The company appealed. The appeal was heard on the 19th of December, 1892.

Cozens-Hardy, Q.C., and *Kirby*, in support of the appeal:—

By the 3rd section of the Act of 1877 the power to reduce

(1) 40 Ch. D. 363.

capital, conferred by the Act of 1867, includes power to cancel any lost capital, or any capital unrepresented by available assets; or to pay off any capital which may be in excess of the wants of the company; and paid-up capital may be reduced either with or without extinguishing or reducing the liability, if any, remaining on the shares of the company.

The arrangement for the sale of the *Metropole Hotel* could, with the consent of the debenture-holders, be carried out under the memorandum and articles of association of the company without the sanction of the Court. This is not the case of a purchase by the company of its own shares. The company is not, in fact, giving money or money's worth for the shares to be extinguished. The shares are all paid up, and the surrender of the shares in question does not operate so as to release the surrendering shareholders from any rights of the company against them. The company, on the other hand, gets £3000 for the stores in the hotel and the goodwill, obtains a release and indemnity in respect of their liabilities under an onerous lease, and compromises a dispute with their managing director, without parting with any saleable asset. The sanction of the Court is in reality only required because the company desires the surrendered shares to be treated as absolutely extinguished, and the reduction of the nominal capital is only sought to be effected to the extent of shares in the company which will not be required after the *Metropole Hotel* has been sold. The arrangement is most beneficial to the company, and the Court has full jurisdiction to authorize the proposed reduction of capital: *Trevor* v. *Whitworth* (1); *In re Barrow Hæmatite Steel Company* (2); *In re Quebrada Railway, Land and Copper Company* (3); *In re Union Plate Glass Company* (4); *In re Gatling Gun, Limited* (5); *In re Agricultural Hotel Company* (6); *In re Vivian and Company* (7); *In re Direct Spanish Telegraph Company* (8); *Buckley* on Companies (9); *Palmer's* Company Precedents (10).

(1) 12 App. Cas. 409, 436.
(2) 39 Ch. D. 582.
(3) 40 Ch. D. 363.
(4) 42 Ch. D. 513.
(5) 43 Ch. D. 628.
(6) [1891] 1 Ch. 396.
(7) W. N. (1886) 32.
(8) 34 Ch. D. 307.
(9) 6th Ed. p. 586.
(10) 4th Ed. pp. 465, 466.

C. A. 1893 — *In re* DENVER HOTEL COMPANY.

1893. Jan. 14. The judgment of the Court (*Lindley*, *Bowen*, and *A. L. Smith*, L.JJ.) was delivered by

LINDLEY, L.J. (who stated the facts of the case, and then continued):—

The arrangement entered into by the agreement of the 8th of March, 1892, has been sanctioned by a special resolution of the shareholders of the company, unanimously passed at a general meeting on the 30th of March, and confirmed at a subsequent meeting on the 14th of April, 1892. All the shareholders were not present when the resolution was passed, but no shareholder has dissented. The debenture-holders and other creditors assent. The arrangement is deemed beneficial by every one. The substance of that arrangement, apart from the reduction of capital which the Court is asked to sanction, is as follows—viz., that, in consideration of £3000, to be paid by Mr. *Bush* to the company, and of his taking upon himself the obligations of the company under the lease, and of indemnifying the company against loss in respect of the *Metropole Hotel* since February, 1891, and in further consideration of his surrendering his shares to the company, the company will sell to him the lease and goodwill and furniture and stores of that hotel.

This appears to us to be a transaction which the company can carry out, with the consent of the debenture-holders, under the company's memorandum and articles of association, without the sanction of the Court. The company can sell part of its assets, and it can accept a surrender of its shares under article 27. No doubt a surrender of shares in consideration of a payment in money or money's worth by the company is a purchase by it of its own shares, and is *ultrà vires*, as pointed out by Lord *Macnaghten* in *Trevor* v. *Whitworth* (1). But, as we understand this transaction, the company is giving nothing in the shape of money or other available assets for the shares which it acquires. The assets it parts with are the consideration for the release of the company from the heavy obligations and liabilities involved in the retention of the onerous lease of the hotel; and, on the other hand, the company is compromising a dispute with its

(1) 12 App. Cas. 409, 438.

managing director. The company might, no doubt, sell the stores and furniture for more than £3000; but it would not in that way get rid of its liabilities under the lease. The bargain would be a good one for the company, even if the shares were not surrendered. The surrender of them is pure gain to the company. The buyer of the hotel, no doubt, hopes to make the hotel pay. He is himself one of the lessors, and may be able to make terms with the other lessors and obtain a less onerous lease. His expectation of profit in some way induces him, not only to pay £3000 in cash, but also to surrender his shares; and we see no reason why the company should not accept the surrender. The shares being fully paid up, their surrender involves no release by the company of any of its rights against the surrenderor.

Under these circumstances the transaction is not really a purchase by the company of its own shares; the transaction is really a sale by the company of some of its assets for less than their cash value, in consideration of a release from heavy burdens and of a surrender of shares, for which, however, it is parting with no saleable asset whatever.

The aid of the Court is not wanted to sanction the transaction, except so far as the company desires to treat the shares when surrendered as permanently extinguished. Unless the capital is formally reduced the surrendered shares may be again issued; they will still be part of the company's nominal capital, and so affect the nominal rate of dividend. The company will not want so large a nominal capital if the transaction is carried out.

The case is thus brought within the Acts which authorize a reduction of capital with the sanction of the Court (see 30 & 31 Vict. c. 131, ss. 9, *et seq.*; 40 & 41 Vict. c. 26, s. 3).

If this transaction really was a purchase by the company of its own shares from one shareholder only, we are of opinion that the Court could not sanction it. The purchase by the company involves the possession by the company of sufficient assets to pay for the shares bought, and the capital represented by such shares would not be lost, nor unrepresented by available assets. The capital might be in excess of the wants of the company, within the words of sect. 3 of the *Companies Act*, 1877. But these words

C. A. 1893 *In re* Denver Hotel Company.

cannot, in our opinion, be construed so as to enable a company to prefer one shareholder to another of the same class as himself by buying up his shares, and we cannot regard Lord *Macnaghten's* judgment in *Trevor* v. *Whitworth* (1) as intimating that any such transaction is within the statute. His remarks were made to enforce his view that, apart from the *Companies Acts*, 1867 and 1877, it is *ultrà vires* of a limited company to buy its own shares, even if its memorandum and articles expressly authorize it to do so. But he was not contemplating preferring one shareholder to another of the same class as himself.

All that the Court is asked to do in this case is to authorize the company to reduce its nominal capital to the extent of the shares which it will not want when the proposed sale of the hotel is carried out. This, we think, the Court can do, the sale itself being one which the company can effect without invoking the aid of the Court. The cases upon reduction of capital are not in a satisfactory state; but none of them conflict with our present decision, having regard to the peculiar facts with which we have to deal.

We therefore authorize the reduction of capital as proposed. The order will be on the usual terms.

The minute for registration approved by the Court was as follows:—

The capital of the *Denver Hotel Company, Limited,* is £131,290, divided into 26,258 shares of £5 each, reduced from 155,000, divided into 31,000 shares of £5 each. At the time of the registration of this minute the sum of £5 per share has been, and is to be deemed to be paid up on 24,732 of the said shares; the residue of such shares, namely, 1526, are unissued.

Solicitors: *Andrew, Mellor, & Smith.*

(1) 12 App. Cas. 436.

W. W. K.

In re MAHON.

C. A.
1892
NORTH, J.
Oct. 27;
Nov. 1.
C. A.
1893
Feb. 1.

Solicitor—Costs—Taxation—"Attendances"—"Drawing Documents"—Case for Opinion of Counsel—Discretion of Taxing Master—"Special Reasons"—General Order under Solicitors' Remuneration Act, 1881, *Sched. II.*

Under Sched. II. to the Solicitors' Remuneration Order the Taxing Master has a discretion in a case, which is not an "ordinary" one, *i.e.*, is more or less difficult than an average case, to increase or to diminish the fee for attendance in that schedule prescribed, according to the circumstances. The discretion must be exercised for "special reasons," but the Taxing Master is not bound to state those reasons until his decision is impeached.

Decision of *North*, J., affirmed.

Held, by *North*, J. (no appeal on this point), that an attendance of a solicitor or his clerk for a merely formal purpose, such as delivering briefs or papers at counsel's chambers, is not an "attendance" within the meaning of Sched. II., and that the practice of the Taxing Masters to allow a fee of only 3*s.* 4*d.* for such an attendance is correct.

Held, also, by *North*, J. (no appeal on this point), that a case for the opinion of counsel is a "document" within the meaning of Sched. II., and that the practice of the Taxing Masters to allow a fee of only 1*s.* per folio as the ordinary fee for the drawing of such a case is wrong.

SUMMONS by solicitors carrying on business as *Hyde, Tandy, Mahon, & Sayer*, to review the Taxing Master's taxation of some bills of costs, which had been taxed on the application of the client.

The bills of costs as delivered amounted to £155 13*s.* 6*d.*, and contained (exclusive of attendances on counsel, and clerk's 3*s.* 4*d.* attendances) eighty-three attendances, for each of which 10*s.* was charged, or in the case of an attendance lasting more than an hour 10*s.* per hour. The Taxing Master allowed thirty of these attendances in full, reduced forty-three to 6*s.* 8*d.*, or 6*s.* 8*d.* per hour, and disallowed ten altogether. He also in two cases reduced a charge of 2*s.* per folio for "drawing case for counsel to advise" to 1*s.* per folio. The result was to reduce the bills to £129 3*s.* 8*d.*

The solicitors carried in written objections to the taxation, the first of which specified nearly all the items for attendances where the charge had been reduced, and a majority of those

C. A. 1893 *In re* MAHON.

where it had been disallowed, and stated the ground of objection as follows:—

(1.) "The attendances represented by the items the subject of this objection were ordinary attendances in an ordinary case, for each of which attendances the solicitors are entitled to charge 10*s.* under Sched. II. of the General Order made in pursuance of the *Solicitors' Remuneration Act*, 1881, and it is submitted that, this not being an extraordinary case within the meaning of the same schedule, a Taxing Master has no discretionary power to increase or diminish the authorized charge. It is further submitted that in no case can a Taxing Master diminish the authorized charge for an attendance without special reasons. It is also submitted that as solicitors were formerly entitled to 6*s.* 8*d.* an hour, they are now entitled to 10*s.* an hour."

The second objection was as follows:—

(2.) "The cases for the opinion of counsel represented by the items the subject of this objection were in an ordinary case, and it is submitted that solicitors are entitled to charge 2*s.* per folio for drawing a case for the opinion of counsel under Sched. II. of the before-mentioned General Order, and that, this not being an extraordinary case within the meaning of the same schedule, a Taxing Master has no discretionary power to increase or diminish the authorized charge. It is further submitted that in no case can a Taxing Master diminish the authorized charge for drawing a case for the opinion of counsel without special reasons."

The Taxing Master answered the objections as follows:—

1. "This objection comprises a large number of items of the same class, *i.e.*, 'attendances' for each of which the solicitor has made a charge of 10*s.* at least. Many of these items I have, in my discretion, diminished.

"It is contended by the objectors that I have no discretionary power either to increase or diminish the 10*s.* items in question, on the ground that they are not of an extraordinary nature within the meaning of the General Order.

"I am not sure that I precisely understand what is here meant by 'extraordinary.' In the present case many of the attendances

were of an extraordinarily simple character, as will be found on reference to the items themselves.

"In cases of extraordinary difficulty I can well understand the Taxing Master having discretion to increase the 10*s.* for an attendance; but I fail to comprehend his having a like discretion to diminish the fee in exceptionally difficult cases. Does it not, therefore, follow that in extraordinarily simple cases the Master has power to diminish the 10*s.*, when in his discretion he thinks it proper to do so—unless this be so is not the second schedule unintelligible? I do not desire in the smallest degree to prejudge the case; at the same time, I cannot resist pointing out that, should these objections prevail, this curious result will follow, viz., in the taxation of a bill comprising conveyancing work, and also a Chancery action, it will in the future be the duty of the Taxing Master to allow two distinct codes of charges for identically the same work—for instance, in the conveyancing part of the bill he will be obliged to allow 10*s.* for attending and paying counsel a one guinea fee, and in the Chancery part of the same bill he will not be able to allow more than 3*s.* 4*d.* Again, in the conveyancing part of the bill, the Master will be obliged to allow 20*s.* for attending to insert an advertisement in two papers; whereas, in the Chancery part of the same bill, he will not be able to allow more than 6*s.* 8*d.* for the same two attendances. Again, in the first case, 10*s.* will be the fee for 'registering a probate,' and in the latter case only 6*s.* 8*d.*

"Do not the attendances specified in the examples just stated come within the definition of 'extraordinary cases'?

"Without a doubt they are attendances of an extraordinarily simple character.

"In taxing costs under the Act (Sched. II.) it has been the uniform custom and practice of all the masters in the Chancery Division to exercise their discretion in dealing with items of the description comprised in this objection, and the case of *Re Reade* (1) seems not only to justify their custom and practice, but to go much further, for, according to my reading of that case, the Master's discretion would seem to include the whole of the items covered by Sched. II. Very likely my interpretation

(1) 33 Sol. J. 219.

C. A. 1893 *In re* MAHON.

is inaccurate, as I cannot quite understand the whole of the items in Sched. II. being within the Master's discretion.

2. "The objectors contend that, this not being an extraordinary matter within the meaning of the second schedule, the Taxing Master has no discretionary power to diminish the 2*s.* per folio charged for drawing the case.

"In the view the objectors take I may assist them by stating, as the fact is, that the case in question, so far from being of an extraordinary nature, was of a very simple character.

"Under the second schedule the Chancery Taxing Masters, one and all, allow 1*s.* per folio only for drawing a case for opinion of counsel. In *Parker* v. *Blenkhorn* (1) it was held that 'documents' was not to be taken in the largest sense of the word. In *In re Parker* (2) it was held that abstracts are not included in 'other documents.' In *In re Robertson* (3) it was held that perusing deeds, &c., was not to be allowed, unless with the view to approve or otherwise.

"Further, if my reading of *Re Reade* (4) be correct, the Master's discretion would again come in. In this matter I am clearly of opinion that, if I had any discretion, 1*s.* per folio is ample for the case in question."

The summons came on for hearing before Mr. Justice *North* on the 27th of October, 1892.

Sir *H. Davey*, Q.C., and *R. F. Norton*, for the solicitors:—

Sched. II. (5) to the Remuneration Order prescribes the fees which solicitors are entitled to charge in "ordinary" cases, both

(1) 14 App. Cas. 1.
(2) 29 Ch. D. 199.
(3) 19 Q. B. D. 1.
(4) 33 Sol. J. 219.

(5) SCHEDULE II.

"*Instructions for, and Drawing and Perusing Deeds, Wills, and other Documents.*

"Such fees for instructions as, having regard to the care and labour required, the number and lengths of the papers to be perused, and the other circumstances of the case, may be fair and reasonable.

In ordinary cases, as to drawing, &c., the allowance shall be:

"For drawing	2*s.*	per folio.
"For engrossing	8*d.*	"
"For fair copying	4*d.*	"
"For perusing	1*s.*	"

Attendances.

"In ordinary cases, 10*s.*

"In extraordinary cases, the Taxing Master may increase or diminish the

with regard to "attendances" and the "drawing of documents." It is admitted that "attendances" in this schedule do not include merely formal attendances of a clerk, *e.g.*, for the purpose of delivering a brief or some other document at counsel's chambers. For such attendances it is admitted that the practice of the Taxing Masters to allow only 3*s.* 4*d.* is correct. But, for all ordinary attendances of a solicitor, or his clerk on his behalf, at which business is transacted, the fee fixed by the schedule ought to be allowed. In "extraordinary cases"—cases extraordinarily simple or extraordinarily difficult—the Taxing Master has no doubt a discretion to reduce or to increase, as the case may be, the prescribed fee. But then he must have "special reasons" to justify him in so doing, and he ought to state those reasons. He must state a special reason with regard to each item. Whether those words in the schedule which follow the fee for "attendances," and give a discretion to the Taxing Master, apply to all that has gone before, or only to the "attendance" fee, is immaterial, for the use of the word "ordinary" implies that the Taxing Master has a discretion in "extraordinary" cases. The effect of the Taxing Master's ruling is to throw on the solicitor the *onus* of shewing special reasons why he should be allowed the fee which is prescribed for ordinary cases. In neither instance has the Taxing Master exercised his discretion properly; he has acted on a definition laid down by the Taxing Masters which is not in accordance with the schedule. In fact, with regard to the fee for drawing a case for the opinion of counsel, the Taxing Masters have systematically disregarded the schedule. A case for the opinion of counsel is clearly a

above charge, if for any special reasons he shall think fit.

"*Abstracts of Title (where not covered by the above scales).*

"Drawing each brief sheet of 8 folios . . 6*s.* 8*d.*

"Fair copy . . 3*s.* 4*d.*

"*Journeys from Home.*

"In ordinary cases, for every day of not less than 7 hours employed on business or in travelling £5 5*s.*

"Where a less time than 7 hours is so employed, per hour 15*s.*

"In extraordinary cases, the Taxing Master may increase or diminish the above allowance, if for any special reasons he shall think fit."

C. A. 1893 *In re* MAHON.

"document" within the meaning of the schedule. *Re Reade* (1), on which the Taxing Master relied, is distinguishable.

Butcher, for the client, was called upon only as to the reduction of the "drawing" fees :—

The Taxing Master has a discretion to diminish, as well as to increase, the fee of 2*s.* per folio. If he thinks that the case is of such a simple character that 1*s.* per folio is a sufficient remuneration for drawing it, he is entitled to reduce the fee to 1*s.* I must admit that the words "other documents" in the schedule include cases for the opinion of counsel, and that the practice of the Taxing Master to allow invariably only 1*s.* per folio for drawing them is wrong. But in the present case the Taxing Master has given other reasons for the reduction, and they shew that he has really exercised his discretion with reference to the particular facts. This being so, the Court will not interfere.

NORTH, J. :—

The amount at stake in this case is not very important; but the question is one of general interest, because the rule which I have to apply governs the taxation of a very large number of solicitors' bills every year. The question is, as to the meaning of the second schedule to the General Order made under the *Solicitors' Remuneration Act* of 1881. [His Lordship read the second schedule, and continued :—]

The note at the end of the second part of the schedule corresponds exactly with the note at the end of the first part, and in my opinion each note applies to that which has gone before it. The first note, indeed, does not, I think, apply to "instructions," because they have been already dealt with in the discretion clearly given to the Taxing Master. But I think the phrase commencing "In extraordinary cases" draws a distinction between what are just before called "ordinary cases" and "extraordinary cases." It divides all cases into "ordinary" and "extraordinary" —"ordinary" meaning the normal, fair, average case, "extraordinary" not meaning merely something more difficult or troublesome than the average case, but including also what is less

(1) 33 Sol. J. 219.

difficult or troublesome than the average case, because, as the Taxing Master points out, it would be absurd to suppose that, if "extraordinary" had been intended to deal only with cases more troublesome than usual, a power should be given to "diminish" the charge fixed for "ordinary cases." I hold that "extraordinary" includes everything which is not a normal average case. It may be more difficult than the average case, and then the charge may be increased; it may be less difficult, and then the Taxing Master may diminish the charge. Again, in my opinion, a similar discretion is given to the Taxing Master by the second note which follows "Abstracts of Title" and "Journeys from Home." In each note the words occur, "if for any special reasons he shall think fit," and it has been suggested that those words mean, "If he thinks fit to do so for any special reasons which he shall state." I do not so read the words. I cannot see that they require as a condition for the increasing or diminishing of the normal charge that the Taxing Master shall state his reasons for what he does. But the schedule does require that he shall adopt the normal charge, unless, for special reasons which he must see in his own mind and act upon, he thinks fit either to treat the case as more difficult or troublesome than usual, and, therefore, to increase the charge, or to treat it as less troublesome or difficult than usual, and, therefore, to diminish the charge. In my opinion the schedule provides that there shall be a normal average charge, which is fixed for the Taxing Master as the general rule, and the increase or diminution will of course depend upon that. There is all the more reason for doing that as regards "attendances," because the charge allowed by the Taxing Masters for ordinary "attendances" before this General Order was made was 6*s.* 8*d.* That normal charge was intended to be for the future 10*s.*, and, therefore, the schedule says that in "ordinary cases" 10*s.* is what the Taxing Master is to take as the proper charge, though, if circumstances require it, for such special reasons as he may see, he may, if he thinks right, allow a larger or a lesser charge.

The schedule says "attendances"; but it is admitted that this does not apply to all attendances, because there are many attendances which are well known, and have been called "clerk's

C. A. 1893 *In re* MAHON. North, J.

attendances"—work which the solicitor does not do himself. To take an illustration given by counsel, a solicitor may require to attend a barrister to leave with him a case for his opinion or to obtain from him a case with his opinion upon it; and that is an "attendance." But it is not work for which the office-boy who takes or brings away the papers, or his master, is to have 10*s.* Such a case, it is admitted, is outside the rule, and it has been so treated by common consent, and it is not now disputed that the word "attendances" in the schedule does not apply to such a formal attendance as that.

Then, to what "attendances" does it apply? In my opinion, it applies to ordinary, normal, average attendances, and it is for the Taxing Master to consider what are such attendances and what are to be treated differently.

In the present case the bills which have been delivered contain eighty-three "attendances" properly so called. They contain other clerks' attendances which are charged only 3*s.* 4*d.* each, and as to that there is no complaint. But there are eighty-three attendances by the solicitor which are charged 10*s.* each. The Taxing Master has allowed thirty of them at 10*s.* each. As to those, of course, there is no question. Ten he has disallowed altogether, and the disallowance is not objected to. I do not believe that any of those attendances have been disallowed because they never took place. I give the solicitors credit for not having sent in a bill charging for ten attendances which did not take place at all. I take it that these ten attendances did in fact take place, but that the Taxing Master in the exercise of his discretion has not thought fit to allow any fee for them. He clearly would have power to strike out a charge made for an attendance which had not taken place; but, if a charge is made for an attendance which has, but ought not to have, taken place, I think he has power to disallow that also. By way of illustration, suppose a solicitor chose to attend his client three times for three different matters, all of which might have been combined in one attendance, I think the Taxing Master would have a perfect right to disallow two of those attendances altogether. He has, in my opinion, under the rule, a clear right in a proper case to disallow attendances, and it is not suggested that these ten attendances

have been improperly disallowed. This leaves a margin of forty-three attendances, for each of which the charge made is 10*s.* The Taxing Master has in each case reduced it to 6*s.* 8*d.* Of these forty-three disallowances some are complained of, but not all. The question, therefore, is, whether the Taxing Master is justified in fixing the charge for an attendance under such circumstances as these at less than 10*s.* If the Taxing Master had dealt with each instance separately and disallowed the 10*s.* for special reasons, that would have been a matter into which I could not have gone. If he has a discretion, it is for him to exercise it. The objection before me comes merely to this (a perfectly legitimate objection, no doubt, to bring before the Court), that, looking at the General Order and the schedule, the Taxing Master has no discretion in such a case as the present. In my opinion he has. He has a discretion to say whether a case is an ordinary one or not. And, in my opinion, the Taxing Master has not done what Sir *Horace Davey* suggests that he has done, viz., acted upon a rule that 6*s.* 8*d.* is the proper ordinary allowance, and reduced all these charges accordingly. If he had done that, he would, in my opinion, have been wrong. In my opinion he must take 10*s.* as the ordinary charge and consider with reference to each particular case whether it is a case for the ordinary charge or whether it ought to be less or more; and I think that is what the Taxing Master has really done in the present case.

But then it is said that the Taxing Master must state special reasons for what he does, and this he has not done. I do not see that he is bound to state special reasons. He must act upon special reasons, and he must have a special reason in each case for fixing a charge other than the ordinary charge. But I do not see that he is under any obligation to state his reason, and in the present case I do not see how he could do so. It cannot surely be said that, whenever he reduces the fee for an "attendance," he must in the first instance give a reason in writing for doing so; and in the present case, if the objection had been to any particular item, the answer to it would have been given as to that item. But here the objection taken is, that the principle of the reduction is the treating 6*s.* 8*d.* as the ordinary charge, in

C. A. 1893 *In re* MAHON. North, J.

defiance of the schedule by which 10*s.* is to be the ordinary charge. In my opinion that is not what the Taxing Master has done. He has treated 10*s.* as the ordinary charge, and he has disallowed these charges, not because the sum which he has allowed is the proper ordinary charge, but because he thinks that, in the particular cases, notwithstanding the provisions in the schedule as to the "ordinary" charge, 6*s.* 8*d.* was sufficient. A very fair instance of what the Taxing Master has done is to be found on page 29 of the bill. On the 9th of February, 1891, there is an attendance for which 10*s.* is charged, and 10*s.* is allowed. On the next day there is a charge of 10*s.* for an attendance which is entirely disallowed; and on the following day, again, there is another charge of 10*s.* for an attendance, which the Taxing Master has reduced to 6*s.* 8*d.* Therefore, instead of adopting a general rule that 6*s.* 8*d.* is the proper ordinary charge, here we have three attendances, side by side, of which he has left one at the 10*s.* charged, he has reduced another to 6*s.* 8*d.*, and the third he has struck out altogether. On the first point, therefore, which goes to the bulk of the items objected to, the objection fails.

Then we come to the other point. There are two instances in which a charge of 2*s.* per folio is made for drawing a case laid before counsel for his opinion; and in each the Taxing Master has reduced the charge to 1*s.* per folio. Has the Taxing Master a discretion to make such a reduction? In my opinion he clearly has. If the case had been very much spun out he would, in my opinion, have a right to say that the ordinary charge should not apply to it, for the special reason that it had not been properly prepared. It would have been prepared with a view to increasing the solicitor's fee and not for the benefit of the client, and, therefore, the Taxing Master might deal with it, either by allowing less than 2*s.* a folio, or by adopting another course which is equally open to him, viz., saying, if the case were fifty folios when twenty would have been ample, "I will allow 2*s.* a folio on twenty folios only, instead of on the whole fifty." The Taxing Master has in the present case reduced the fee to 1*s.* per folio. The question is, upon what ground he has done this. He has not done it upon such a ground as that which

I have suggested as one which would justify a reduction. He has done it (as I understand his reason) upon this ground, that the schedule provides a scale for "drawing and perusing deeds, wills, and other documents," and that a case for the opinion of counsel is not an "other document" within the meaning of those words. He says it has been held that an abstract of title, which unquestionably is a document, is not an "other document" within the meaning of the schedule. But the reason why abstracts have been held not to come within those words is, that immediately afterwards there is a special provision made as to abstracts. I do not see how I can say that "drawing and perusing deeds, wills, and other documents" does not include such a document as a case for the opinion of counsel, unless "other documents" means only documents *ejusdem generis* with deeds and wills, which a case for counsel's opinion is certainly not. Neither the Taxing Master nor any of the counsel has suggested that that is the meaning of the words, and I do not think it is. It follows that a case for the opinion of counsel is an "other document," and *primâ facie* comes within the rule, and I do not agree with the Taxing Master's view that it is not a "document" within Sched. II.

Then he says that the rule is invariable in the Taxing Master's offices to allow only 1*s.* per folio for drawing cases for the opinion of counsel. I do not see on what ground any such general rule can be laid down. I think the Taxing Master has a clear jurisdiction to allow less or more than the 2*s.* per folio in a proper case, if for special reasons he thinks fit to do so. But, unless there is some special reason, 2*s.* per folio is, in my opinion, what he ought to allow for drawing a case for counsel's opinion. I do not, therefore, agree with the first ground on which the Taxing Master has based his decision, and, indeed, Mr. *Butcher* has not attempted to support it. But it is suggested that the Taxing Master has given a second reason, viz., that he has a discretion which he has exercised, and that I ought not to overrule his discretion. If he had exercised his discretion by saying, "Although 2*s.* per folio is the proper ordinary allowance for drawing a case for the opinion of counsel, yet the circumstances of this particular case are such that there is a special reason for saying that

C. A. 1893 *In re* MAHON. North, J.

2*s.* is too much, and I, therefore, allow only 1*s.*," I should have thought that it was not open to me to review the exercise of his discretion in the particular case. But I do not so read his observations. I understand him to mean this, "One shilling per folio is the charge universally allowed in the Taxing Master's offices, and, looking at these two cases, I think that a shilling a folio is quite enough." In that view I do not agree. If he had said, "On looking at these two particular cases I think that they only deserve half the ordinary normal charge for drawing a case, and, therefore, I allow only 1*s.* per folio instead of 2*s.*," I should have felt that I was bound by his discretion. But I do not think that is what he has said, and, therefore, in my opinion, 2*s.* a folio is the proper sum to allow for drawing these cases.

Then the question remains, whether the matter shall be remitted to the Taxing Master, that he may say whether he had any special reasons for reducing the allowance. I do not think he had. He has given his reasons, and I have seen what they are; and, in order to save the parties the costs of referring the matter back, I have looked at the two cases myself, and I can see no reason for saying that they are not cases of an average normal character. One of them extends over two pages, and the question put to counsel is, "Counsel is requested to advise on the six several points raised above." If there are six several points for the opinion of counsel raised in the course of two pages, it does not seem to me that the case is of an extravagant length. Therefore, I do not intend to refer the matter back to the Taxing Master, but I propose to allow the summons so far as it relates to the two cases for the opinion of counsel, and to refuse it as to the "attendances."

W. L. C.

C. A.

The solicitors appealed from the disallowance of the first objection. The appeal was heard on the 1st of February, 1893.

Sir *H. Davey*, Q.C., and *R. F. Norton*, for the appeal:—

We object to the Taxing Master having reduced a number of fees for attendances from 10*s.* to 6*s.* 8*d.*, without any special reasons. He, no doubt, in any "extraordinary cases," that is

cases extraordinarily simple or extraordinarily difficult, can vary the amount; but he must have special reasons, and those reasons he ought to state at the time. The Taxing Master here has, in reality, gone upon the ground that 6*s.* 8*d.* is the ordinary attendance fee, which may be increased in difficult cases to 10*s.*, for he refers to the Chancery scale. The case must be "extraordinary," that is something different from the normal average case, to give him jurisdiction to vary the amount; but when he has the jurisdiction he can only exercise it "for special reasons," and these reasons he must give. The rules cannot have intended that he should act on special reasons which he does not disclose.

Butcher, for the client, was not called upon.

LINDLEY, L.J.:—

This is an appeal from a decision of Mr. Justice *North*, upholding the Master in the taxation of a bill of costs to which objections had been taken in the ordinary course. The appeal raises, or is intended to raise, a question of some little importance upon that part of Sched. II. of the General Order of 1882, relating to the remuneration of solicitors, which runs thus, under the head of attendances: "In ordinary cases 10*s.*; in extraordinary cases, the Taxing Master may increase or diminish the above charge, if for any special reasons he shall think fit." In this case, a firm of solicitors have carried in bills, and the Taxing Master has reduced forty-three charges of 10*s.* for attendances, and disallowed some others altogether. The solicitors have carried in objections, and their first objection runs thus: "The attendances represented by the items the subject of this objection, were ordinary attendances in an ordinary case, for each of which attendances the solicitors are entitled to charge 10*s.* under Sched. II.; and it is submitted that this not being an extraordinary case within the meaning of the same schedule, a Taxing Master has no discretionary power to increase or diminish the authorized charge. It is further submitted that, in no case can a Taxing Master diminish the authorized charge for an attendance without special reasons. It is also submitted that, as solicitors were formerly entitled to 6*s.* 8*d.* an hour, they are now entitled to 10*s.* an hour."

C.A. 1893 *In re* MAHON. Lindley, L.J.

The Taxing Master has put in an answer to those objections. He says: "This objection" (that is the one I have referred to), "comprises a large number of items of the same class, *i.e.*, 'attendances,' for each of which the solicitor has made a charge of 10*s.* at least. Many of these items I have, in my discretion, diminished. It is contended by the objectors that I have no discretionary power either to increase or diminish the 10*s.* items in question, on the ground that they are not of an extraordinary nature within the meaning of the General Order. I am not sure that I precisely understand what is here meant by 'extraordinary.' In the present case many of the attendances were of an extraordinarily simple character, as will be found on reference to the items themselves."

Then there are some further observations, which I will not read. Sir *Horace Davey* read them, and they are fresh in our recollection.

Now the important points are these: First of all, what is meant by an extraordinary attendance, and who is to decide whether an attendance is ordinary or extraordinary? I take it that an "extraordinary" attendance in the schedule means an attendance which is not ordinary. An attendance may be such as to deserve a payment of more than 10*s.*, and if the Taxing Master thinks so, he can allow more than 10*s.* An attendance may be such that it may not deserve 10*s.* In that case the Taxing Master need not allow 10*s.*; but he is to allow 10*s.* for an ordinary attendance, if, in his judgment, such attendance was necessary. I do not know how to define "ordinary attendance" better than by adopting the expression of Mr. Justice *North*, a "normal fair average" attendance.

It has been contended by Sir *Horace Davey*, that the Taxing Master has taken the wrong standard, and has applied the rule that 6*s.* 8*d.* and not 10*s.* ought to be allowed for ordinary attendances. If that had been made out I think the Taxing Master would have misconstrued the rule and would have been wrong; but I do not think that it is made out. It appears to me, that he has looked at each item and considered first of all whether it was a case in which an attendance ought to be charged for at all, and, if so, whether as much as 10*s.* ought to be charged. It does

not follow that, because there has been an attendance, 10*s.* is to be paid for it. A great deal of business may be done by attendances for the purpose of getting 10*s.*, which ought to be done in some other way, so as to avoid so large a charge. The Taxing Master is bound to protect people against unnecessary attendances, and that is no easy matter. Here, in some cases, he has struck out an attendance altogether as unnecessary; and, it is to be observed that, in several of these cases, his decision was not objected to. In other cases he considered the nature of the thing, and, having come to the conclusion that the work done at the attendance was very trifling, he reduced the charge. This was right in principle, and so far he has not gone wrong.

Then it was said there must be special reasons, and that he must state them. Special reasons, of course, he must have for departing from the rule; but he is not bound to state special reasons every time he marks off 3*s.* 4*d.* or 6*s.* 8*d.* The time for stating them is when he formally answers the objections which are made to the taxation. He must have them at the time of the taxation, and he must state them when he answers the objection; that he has done.

It appears to me, then, that the Taxing Master has gone upon a correct principle, and, that being so, we cannot enter into questions about particular items. Whether an attendance related to so simple a matter that less than 10*s.* ought to be allowed, is a matter for the Taxing Master's discretion.

I think, therefore, the appeal must be dismissed, with costs.

LOPES, L.J.:—

Whether an attendance is to be placed on the one side or on the other side of an ordinary case, that is, by being more simple or more difficult than an ordinary case, is a question for the discretion of the Master; and I am of opinion that, if he exercises that discretion properly without violating any principle, his decision is final, and cannot be reviewed by this Court. He has to consider the particular circumstances of each case and to exercise his judgment thereon. Now, it is said by Sir *Horace Davey*—and if he could have made it out, no doubt he would have been entitled to succeed upon this application—that the Master has

C. A. 1893 *In re* MAHON. Lopes, L.J.

acted on a wrong principle, viz., that in defiance of part of the schedule which relates to attendances, and which says that in ordinary cases 10*s.* is to be charged, he has taken 6*s.* 8*d.* as the proper charge for an ordinary case. In my opinion he has not acted upon that principle. The learned Judge in the Court below so thought, and in this we agree with him.

Then it is provided that the Taxing Master may increase or diminish the above charge, if for any special reasons he shall think fit. Now, it is said, that he ought to have stated his special reasons for either increasing or diminishing the charge and, as I understand it, that he ought to have stated them at the time. But I cannot read that in the rule, nor do I think it can be so. It is quite enough in my opinion if, when the objection is taken, he states his special reasons in his answer.

With regard to the disallowance of attendances, we can quite imagine that attendances are sometimes charged where no attendance was necessary, where, for instance, a letter or a message would have answered the purpose equally well. In such a case, the Master would be quite right in altogether striking out the charge for that attendance.

I think that this appeal should be dismissed.

KAY, L.J.:—

I agree.

Solicitors: *Hyde, Tandy, Mahon, & Sayer; Hicks, Arnold, & Mozley.*

H. C. J.

DAVID *v.* SABIN.

[1891 D. 346.]

C. A.
1892
ROMER, J.
June 2, 29.
C. A.
Nov. 7, 9, 10.
1893
Feb. 3.

Vendor and Purchaser—Conveyance as "Beneficial Owner"—Implied Covenants for Title—Secret Incumbrances created by Person from whom Vendor purchased—Effect of Vendor's previous Ownership—Conveyancing and Law of Property Act, 1881 (44 & 45 *Vict. c.* 41), *s.* 7, *sub-s.* 1 (A).

The Defendant granted a lease of land to *B.* for ninety-nine years, and afterwards *B.* granted certain sub-leases by way of mortgage. He then, for value, surrendered the term to the Defendant, without disclosing the existence of the sub-leases. By a subsequent deed the Defendant, for value, conveyed the fee simple, "as beneficial owner," to *B.*, under whom the Plaintiff claimed. Some time afterwards the Plaintiff and Defendant discovered the existence of the mortgage sub-leases; and the Plaintiff then brought an action against the Defendant for damages for the breach of the implied covenant contained in his conveyance, as "beneficial owner," to *B.*:—

Held (reversing the decision of *Romer*, J.), that the grant of the lease for ninety-nine years to *B.*, which was still outstanding for the benefit of the mortgage sub-lessees, was an act "done by the Defendant" within the meaning of the implied covenant for right to convey; that the creation of the mortgage sub-leases by *B.* was an incumbrance "made by a person rightfully claiming through the Defendant," within the meaning of the implied covenants for quiet enjoyment and freedom from incumbrances; and that the Plaintiff was entitled to claim damages against the Defendant for breach of those covenants.

Held, also, that although the Defendant would have had a good defence against *B.* if he had brought an action for breach of the covenant, on the ground of *B.*'s fraud, he had no such defence against the Plaintiff, who had purchased without notice of the fraud, and was not affected by *B.*'s disability.

Per Lindley, L.J.: *Semble*, that inasmuch as the Defendant was ignorant of the existence of the sub-leases, his omission to get them in was not in itself an act "omitted" by him within the meaning of the implied covenant for right to convey.

By a lease, dated the 24th of June, 1885, *G. Sabin*, who was tenant for life of the property, demised several pieces of land at *Forest Hill*, *Lewisham*, to *B. Baylis* for ninety-nine years, at a yearly rent of 10*s.*

By three mortgages, dated respectively the 31st of July, 1885, the 24th of November, 1885, and the 24th of November, 1885, *B. Baylis* demised the pieces of land to various mortgagees for

C. A. 1893 DAVID v. SABIN.

the residue of the term of ninety-nine years granted by the lease, except the last day thereof, to secure various sums of money and interest.

By an indenture, dated the 5th of January, 1887, and indorsed on the lease, *B. Baylis*, for valuable consideration, "as beneficial owner," surrendered and conveyed the whole of the demised premises to *G. Sabin* to the intent that the residue of the term of ninety-nine years and all other the estate and interest of *B. Baylis* in the premises by virtue of the lease might be merged and extinguished in the reversion and inheritance of the same premises.

By an indenture, dated the 16th of June, 1887, *G. Sabin*, under the powers of the *Settled Land Act*, in consideration of £17 10*s.*, "as beneficial owner," conveyed part of the land to *B. Baylis* in fee. *G. Sabin* was, at the respective dates of the surrender to himself and the conveyance of the 16th of June, 1887, ignorant of the execution of the mortgages by sub-demise granted by *B. Baylis*.

By indenture, dated the 17th of June, 1887, *B. Baylis*, in consideration of £1000, conveyed the pieces of land comprised in the last-mentioned deed to *O. Bryant*, *B. Baylis* entering into express covenants with the latter that he, *B. Baylis*, had good right to convey, for quiet enjoyment, free from incumbrances, and for further assurance.

By an indenture, dated the 20th of July, 1887, *O. Bryant*, as beneficial owner, granted to the Plaintiff *Marcar David*, by way of mortgage, the premises comprised in the last-mentioned deed; and by an indenture, dated the 5th of July, 1888, the equity of redemption in the same premises was released to *David*.

In an action of *David* v. *Brushfield* (1889 D. 1346), the mortgagees under the mortgages by sub-demise granted by *B. Baylis* were held to be entitled to a charge in priority to *M. David*.

M. David commenced an action against *G. Sabin* for damages occasioned by the alleged breach by the latter of his covenants for title implied, under sect. 7, sub-sect. 1, of the *Conveyancing and Law of Property Act*, 1881 (1), by the fact of *G. Sabin*

(1) 44 & 45 Vict. c. 41, s. 7, sub-s. 1: "In a conveyance there shall, in the several cases in this section mentioned, be deemed to be included, and there

having, "as beneficial owner," conveyed the lands to *B. Baylis* on the 16th of June, 1887.

C. A. 1893 DAVID v. SABIN.

shall in those several cases, by virtue of this Act, be implied, a covenant to the effect in this section stated, by the person or by each person who conveys, as far as regards the subject-matter, or share of subject-matter, expressed to be conveyed by him, with the person, if one, to whom the conveyance is made . . . . that is to say:

"(A) In a conveyance for valuable consideration, other than a mortgage, the following covenant by a person who conveys and is expressed to convey as beneficial owner (namely): That, notwithstanding anything by the person who so conveys, or any one through whom he derives title, otherwise than by purchase for value, made, done, executed, or omitted, or knowingly suffered, the person who so conveys, has, with the concurrence of every other person, if any, conveying by his direction, full power to convey the subject-matter expressed to be conveyed, subject as, if so expressed, and in the manner in which, it is expressed to be conveyed, and that, notwithstanding anything as aforesaid, that subject-matter shall remain to and be quietly entered upon, received, and held, occupied, enjoyed, and taken, by the person to whom the conveyance is expressed to be made, and any person deriving title under him, and the benefit thereof shall be received and taken accordingly, without any lawful interruption or disturbance by the person who so conveys or any person conveying by his direction, or rightfully claiming or to claim by, through, under, or in trust for the person who so conveys, or any person conveying by his direction, or by, through, or under any one not being a person claiming in respect of an estate or interest subject whereto the conveyance is expressly made, through whom the person who so conveys derives title, otherwise than by purchase for value; and that, freed and discharged from, or otherwise by the person who so conveys sufficiently indemnified against, all such estates, incumbrances, claims, and demands other than those subject to which the conveyance is expressly made, as either before or after the date of the conveyance have been or shall be made, occasioned or suffered by that person or by any person conveying by his direction, or by any person rightfully claiming by, through, under, or in trust for the person who so conveys, or by, through, or under any person conveying by his direction, or by, through, or under any one through whom the person who so conveys derives title, otherwise than by purchase for value; and further, that the person who so conveys, and any person conveying by his direction, and every other person having or rightfully claiming any estate or interest in the subject-matter of conveyance, other than an estate or interest subject whereto the conveyance is expressly made, by, through, under, or in trust for the person who so conveys, or by, through, or under any person conveying by his direction, or by, through, or under any one through whom the person who so conveys derives title, otherwise than by purchase for value, will, from time to time and at all times after the date of the conveyance, on the request and at the cost of any person to whom the conveyance is expressed to be made, or of any person deriving title under him, execute and do all such lawful assurances and

C. A. 1893 DAVID v. SABIN.

The action was tried before Mr. Justice *Romer* on the 2nd of June, 1892.

Haldane, Q.C., and *Alexander Young*, for the Plaintiff:—

The Defendant by his conveyance, as beneficial owner, for valuable consideration, of the 16th of June, 1887, entered into the covenants implied by sect. 7, sub-sect. 1, of the *Conveyancing Act*, 1881. At the date of that conveyance there were existing sub-leases, which were not put an end to by the previous surrender by *Baylis* to the Defendant of the lease of the 24th of June, 1885, and these sub-leases had been created by a person "rightfully claiming through or under" the person conveying, within the meaning of the section. Estoppel is one of the defences set up; but only an absolute recital of title would suffice to support such a defence: *General Finance, Mortgage, and Discount Company* v. *Liberator Permanent Benefit Building Society* (1).

[ROMER, J.:—Suppose *Baylis* had sued the Defendant on the implied covenants in the deed of the 16th of June, 1887, would it not have been an answer to say that *Baylis* had obtained the conveyance in its absolute form by his own fraud?]

That may be so; but it is an objection which is personal to *Baylis*, and cannot be raised as against the Plaintiff. The legal right to sue is in the Plaintiff, and there is no equity against him. Even under the old law the Defendant would have been liable.

The breach, though committed at the time when the deed was executed, is a continuing breach: *Kingdon* v. *Nottle* (2); and it is no answer to an action on it that the Plaintiff has a right of action against *Bryant*, from whom he immediately claimed title; because the Defendant's covenants for title run with the land: *Spencer's Case* (3). The Plaintiff is entitled

---

things for further or more effectually assuring the subject-matter of the conveyance to the person to whom the conveyance is made, and to those deriving title under him, subject as, if so expressed, and in the manner in which the conveyance is expressed to be made, as by him or them or any of them shall be reasonably required . . . ."

(1) 10 Ch. D. 15.

(2) 4 M. & S. 53.

(3) 5 Rep. 16 a.

under the statute to damages or an indemnity. If the land were of greater value than the mortgages on it, the Plaintiff would have to pay off the mortgages, and in that case the amount paid would be the measure of damages. If the mortgages are left undisturbed, the Plaintiff is entitled to the value of the property.

Neville, Q.C., and *Macnaghten*, for the Defendant:—

The question to be decided is, Who are the persons against whose acts the Defendant has covenanted to protect the person purchasing from him, and those claiming under him? Sect. 7, sub-sect. 1 (A), is governed by the preliminary words, "notwithstanding anything by the person who so conveys, or any one through whom he derives title, otherwise than by purchase for value." *Baylis* was the person through whom the Defendant derived title; but the surrender he took from *Baylis* of the only interest on which there are incumbrances was a purchase for valuable consideration; and the Defendant, therefore, did not covenant that he had a title notwithstanding anything done by *Baylis*, who was the person who created the incumbrances. Before the passing of the Act vendors, if they themselves had acquired the property by purchase (otherwise than by will) covenanted against acts of themselves or those claiming under them. If they had acquired the property otherwise than by conveyance for value, they covenanted also against anything done by their ancestors or testators; but the vendor has never, either under the old practice or the Act, covenanted against acts committed by a person from whom he has purchased for value. The Defendant has really two titles. One is to the freehold, which is not incumbered; the other is to the term created by the lease of the 24th of June, 1885. The latter was incumbered by the creation of the sub-terms by *Baylis*, and on his surrendering the original lease to the Defendant the sub-terms were preserved by 8 & 9 Vict. c. 106, s. 9. As to the term surrendered, or such portion of it as is included in the sub-leases, the Defendant was a purchaser for value from *Baylis*, and this brings the case within the exception in the *Conveyancing Act*. This is not a case of a mortgagee giving absolute

C. A. 1893 DAVID v. SABIN.

covenants for title. The Plaintiff wishes to extend the implied covenants to something done by a person claiming under the grantor, under a conveyance by the latter previously to the time when he acquired the title under which he conveyed to the Plaintiff's predecessor in title. But such a case is not within the Act. The covenants only extend to acts done after the time when the vendor last acquired title by a conveyance for value. If the Plaintiff is right in his contention, a vendor conveying in good faith as beneficial owner would be liable if his grandfather, one hundred years ago, had sold the property to a man whose successors in title had created incumbrances and then conveyed the property, concealing the fact of the incumbrances, to the vendor.

Haldane, in reply.

1892. June 29. ROMER, J.:—

The facts of this case are agreed, and, so far as material for the decision of the point of law which arises, may be stated as follows: The Defendant, "as beneficial owner," conveys lands for valuable consideration to the Plaintiff's predecessor in title in fee simple, and the Plaintiff is entitled as against the Defendant to the benefit of implied covenants for title according to the *Conveyancing and Law of Property Act*, 1881, s. 7, sub-s. 1 (A).

It appears that, before this conveyance, the Defendant had for value granted a lease of the lands for a long term, but had subsequently for value purchased this lease from the lessee and obtained from him a surrender of it. Some time after the conveyance by the Defendant it was discovered by the Plaintiff and Defendant that the lessee had, between the dates of the lease and surrender, granted sub-leases of the lands, which remained valid notwithstanding the surrender, and seriously affected the value of the fee bought by the Plaintiff. The Defendant was ignorant of the existence of these sub-leases, both at the date of the surrender and when he conveyed the fee. The Plaintiff says that the Defendant is nevertheless liable to him in damages for breach of the implied covenants for title, and the question I have to decide is whether on the facts stated the Defendant is so liable.

In my judgment, the Defendant is not liable. The implied covenants for right to convey and quiet enjoyment, freed from incumbrances, are all prefaced and limited by these words, "notwithstanding anything by the person who so conveys"—*i.e.*, as beneficial owner—"or any one through whom he derives title otherwise than by purchase for value, made, done, executed, or omitted, or knowingly suffered." The sub-leases were the acts, not of the Defendant, but of his lessee, and the Defendant, being a purchaser for value of the lease, is not liable for the acts or omissions of those through whom he claims the lease purchased. And it is clear that the word "omitted" in the covenant does not extend to a case where the covenantor, when he purchases and resells a property, does not perfect his title by getting in an incumbrance of which he is unaware. I ought, perhaps, to say a few words about the implied covenant for further assurance, although it is not expressly sued on in this action. This covenant is not expressly limited by the words I have above referred to as limiting the prior covenants for right to convey and quiet enjoyment; but I think that in construing it regard should be had to the limitation of those prior covenants. It is laid down in *Comyn's* Digest (Covenants, D. 1), that a covenant "shall be expounded with regard to the context and intent of the deed," and (Covenants, D. 2), that "covenants shall be expounded with regard to covenants synonymous, or of the same nature, in the same deed;" and these rules of construction have been followed in several cases: see (*inter alia*) *Nind* v. *Marshall* (1), where the words of a covenant in form unlimited were held confined to the acts of the covenantor and those claiming under him. Bearing this in mind, I think that, as to this covenant also, the Defendant is not bound to procure the assurance of the sub-lessees. No doubt, the sub-lessees claim under the Defendant because he granted the lease; but they claim, not directly from, or by an act of, the Defendant, and only in a secondary sense from him. The sub-lessees claim primarily and directly under the lessee who sold his lease to the Defendant for value; and to make the covenant of the Defendant for further assurance include further assurance by the sub-lessees would, in my opinion, be giving an extended meaning to it for

(1) 1 Brod. & B. 319.

C. A. 1893 DAVID v. SABIN. Romer, J.

which there is no sufficient ground. For these reasons, I think the Plaintiff fails; and I may add that, to hold otherwise would have very far-reaching consequences, and make a vendor liable in cases which cannot be legally distinguished from the present, and where I think he is not intended and ought not to be made liable by the ordinary covenants for title and further assurance. For instance, take the case of a young man selling his estate in fee and then buying it back, say, fifty years later, after many dealings with it in the intervals by the owners for the time being. If he or his heir then sold the estate, giving the usual covenants, ought he or the heir to be held liable, on those covenants, for all the acts of the owners of the estate during the fifty years? I think not. I must dismiss the action with costs.

F. E.

C. A. From this judgment the plaintiff appealed. The appeal came on for hearing on the 7th of November, 1892.

Haldane, Q.C., and *Sheldon*, for the Plaintiff.

Neville, Q.C., and *Macnaghten*, for the Defendant, referred to *Browning* v. *Wright* (1); *Taylor* v. *Needham* (2); *Sugden's* Vendors and Purchasers (3).

Haldane, in reply.

1893. Feb. 3. LINDLEY, L.J.:—

By a deed dated the 16th of June, 1887, the Defendant *Sabin* conveyed some land to a Mr. *Baylis* in fee for valuable consideration. *Sabin*, who was the vendor, was tenant for life under his father's will, and conveyed under the powers conferred on tenants for life by the *Settled Land Act*. He conveyed as beneficial owner; he did not expressly enter into any covenants for title, but the vendor's covenant for title set out in sect. 7, sub-sect. 1 (A), of the *Conveyancing Act*, 1881 (44 & 45 Vict. c. 41), must by that Act be treated as contained in the conveyance. The Plaintiff is the present owner of the land; he claims through *Baylis*, and

(1) 2 Bos. & P. 13. (2) 2 Taunt. 278.
(3) 14th Ed. p. 605.

contends that he is entitled, as *Baylis's* grantee of the land, or, in other words, as his assign, to the benefit of the covenant for title to which I have referred. This action is brought by the Plaintiff against the Defendant for a breach of that covenant. The alleged breach is that when *Sabin* conveyed to *Baylis* the property was subject to three outstanding mortgages, and that *Sabin*, therefore, was not in a position to convey the land in fee free from incumbrances, which, the Plaintiff contends, is what *Sabin* professed to do. The existence of these incumbrances is indisputable. They were unknown to *Sabin* when he conveyed to *Baylis*. They had been created by *Baylis* himself, and must have been known to him and have been concealed from *Sabin*. They arose in this way. On the 24th of June, 1885, *Sabin*, who was tenant for life of the land in question, granted a lease to *Baylis* for ninety-nine years. In 1885 *Baylis* executed three mortgages of the land so leased to him. These mortgages were sub-leases by way of mortgage. On the 5th of January, 1887, by a deed indorsed on the lease of the 24th of June, 1885, *Baylis*, as beneficial owner, surrendered that lease to *Sabin*. The sub-leases, of course, were not merged or extinguished by this surrender, and they are the incumbrances against which the Plaintiff seeks to be indemnified by *Sabin*.

Two questions were discussed, viz.: (1.) Whether *Sabin's* covenant extended to these incumbrances. (2.) If it did, then whether the Plaintiff, who claims through *Baylis*, is in a better position than *Baylis* would be himself if he were suing on the covenant. The first question was decided against the Plaintiff by Mr. Justice *Romer*, and from that decision this appeal is brought. On looking at the covenant set out in sect. 7, subsect. 1 (A), of the *Conveyancing Act*, 1881, it will be seen that the covenants for right to convey, for quiet enjoyment, freedom from incumbrances, and for further assurance, are not four separate and distinct covenants, but parts of one entire covenant beginning with and controlled throughout by the words, "That notwithstanding anything by the person who so conveys, or any one through whom he derives title, otherwise than by purchase for value." These words render a vendor's covenant a qualified covenant, and not an absolute warranty of title, as

C. A. 1893 DAVID v. SABIN. Lindley, L.J.

is the covenant by a mortgagor who conveys as beneficial owner (see clause C of the same section). The statute has, in this respect, followed the long-established and well-known practice of conveyancers, as may be seen from *Browning* v. *Wright* (1), *Church* v. *Brown* (2), and the ordinary forms of conveyances. But, although a vendor's covenant for title is not an absolute warranty of title, it is very wide. The acts and omissions covenanted against are reducible to four heads—viz., (1.) the acts and omissions of the vendor himself; (2.) the acts and omissions of persons through whom he claims otherwise than by purchase for value; (3.) the acts and omissions of persons claiming through him; (4.) the acts and omissions of persons claiming in trust for him. These last two are, it is true, not enumerated in the words at the beginning of the covenant, but they are introduced afterwards, and may be very important. In this particular case the acts and omissions of persons claiming in trust for *Sabin* may be disregarded as immaterial. The acts and omissions of persons through whom *Sabin* claims—*i.e.*, *Baylis*—may be also passed over for the present, because *Sabin*, so far as he claims through *Baylis*, claims through him by purchase for value. Let us then leave out the second and fourth of the above heads, and see how *Sabin's* covenant will then stand. It will run thus: "That notwithstanding anything by the person who so conveys (*i.e.*, *Sabin*) made, done, executed, or omitted, or knowingly suffered, the person who so conveys (*i.e.*, *Sabin*) has full power to convey the subject-matter expressed to be conveyed; and that, notwithstanding anything as aforesaid, that subject-matter shall remain to and be quietly entered upon, received and held, occupied, enjoyed, and taken by the person to whom the conveyance is expressed to be made (*i.e.*, *Baylis*) and any person deriving title under him (*i.e.*, the Plaintiff *David*), and the benefit thereof shall be received and taken accordingly without any lawful interruption or disturbance by the person who so conveys (*i.e.*, *Sabin*), or any person rightfully claiming or to claim by, through, or under the person who so conveys (*i.e.*, *Baylis's* incumbrancers, claiming immediately through him, but also claiming through *Sabin*), and that freed

(1) 2 Bos. & P. 13. (2) 15 Ves. 258, 263.

and discharged from, or otherwise by the person who so conveys (*i.e.*, *Sabin*), sufficiently indemnified against all such estates, incumbrances, claims, and demands as either before or after the date of the conveyance (*i.e.*, *Sabin's* conveyance) have been or shall be made, occasioned, or suffered by that person (*i.e.*, the person who so conveys—namely, *Sabin*), or by any person rightfully claiming by, through, or under the person who so conveys (*i.e.*, *Sabin*); and, further, that the person who so conveys (*i.e.*, *Sabin*), and every other person rightfully claiming any estate or interest in the subject-matter of conveyance by, through, or under the person who so conveys (*i.e.*, *Baylis's* incumbrancers, claiming immediately through him, but mediately through *Sabin*), will from time to time and at all times after the date of the conveyance (*i.e.*, *Sabin's* conveyance), on the request and at the cost of any person to whom the conveyance is expressed to be made (*i.e.*, *Baylis*), or of any person deriving title under him (*i.e.*, the Plaintiff), execute and do all such lawful assurances and things for further or more perfectly assuring the subject-matter of the conveyance to the person to whom the conveyance is made (*i.e.*, *Baylis*), and those deriving title under him (*i.e.*, the Plaintiff), as by him or them or any of them shall be reasonably required." This covenant in terms extends (1.) to the terms created by *Sabin* himself, and (2.) to the underleases created by *Baylis*, who claimed through *Sabin*. Let us consider these a little more closely. Although the term created by *Sabin* in favour of *Baylis* was afterwards surrendered, and no longer exists as a separate and distinct term, still it is not wholly extinguished even at law. The surrender of the term only operated as an assignment of the surrenderor's interest in it: see *Co. Litt.* (1); 1 *Wm. Saunders* (2); *Davenport's Case* (3); *Mellor* v. *Watkins* (4). The term was not merged in the sense of being extinguished for all purposes. The right to the possession of the land, to hold and enjoy it, created by *Sabin*, still exists, although for purposes of securing money only; but the continued existence of this right constitutes a defect in *Sabin's* title, and it is a defect of his own creation arising from an act

(1) 338 b.
(2) 235 c, note m.
(3) 8 Rep. 144 b.
(4) Law Rep. 9 Q. B. 400.

C. A. 1893 DAVID v. SABIN. Lindley, L.J.

done by himself. Further, the incumbrancers claim through *Sabin* himself, though their claim through him is based immediately on what was done by his lessee. The Plaintiff's case is therefore brought directly within the words of those parts of *Sabin's* covenant which relate to quiet enjoyment and freedom from incumbrances and further assurances. The incumbrancers "claim by, through, or under the person who so conveys"—*i.e.*, the vendor *Sabin*. So that this case is really brought within the words of every part of the covenant, confining it throughout to the acts of *Sabin* and of persons claiming through him.

This view of the case renders it unnecessary to decide whether *Sabin's* omission to get in the underleases would of itself amount to a breach of his covenant. Upon this point, therefore, I will say no more than that, as he knew nothing about them, he did not knowingly suffer them to remain outstanding; and, although in one sense he omitted to get them in, I see no answer to his counsel's contention that if a vendor who takes all reasonable care is liable for not getting in an incumbrance of which he knows nothing, the statutory covenant would really be a warranty, which it clearly is not. But, even if *Sabin* is not liable for his own omission to get in these underleases, I am by no means clear that he is not liable for *Baylis's* omission to get them in. *Sabin's* covenant extends not only to the acts, but also to the omissions of those who claim under him; and the fraudulent concealment from him of these incumbrances does not, in my opinion, affect the construction of this part of the covenant, and does not deprive the Plaintiff of any rights which he would otherwise have against *Sabin*. It must not be overlooked that this is not a case in which a vendor creates an incumbrance, then sells the fee, then repurchases, and afterwards sells again with the ordinary covenant for title. The covenant by a vendor in fee is not understood as extending to acts done previously to the last preceding sale. On each sale the title is investigated, and conveyancers are content with a series of covenants of title each of which covers the time which has elapsed since the last covenant from a vendor in fee. The covenants set out in the *Conveyancing Act* must be construed with reference to the ordinary course of business in sales of land and to the practice of con-

veyancers. This is the true answer to many of the cases ingeniously suggested in argument with a view to shew that the construction adopted by Mr. Justice *Romer* was correct.

But reliance is placed upon the protection afforded to *Sabin* as a purchaser for value from *Baylis*. The words "otherwise than by purchase for value" have, however, no reference to the covenantor's own acts or omissions since the last sale of the fee, nor to the acts or omissions of persons claiming through him. Those words are confined to acts or omissions of persons through whom he claims since the last sale of the property. They would protect *Sabin* from liability in respect of what *Baylis* did if the only connection between them was that *Sabin* derived title through *Baylis*; but the words in question have no application to his liability for what he did himself, nor to his liability for the acts of persons claiming through him, and these include *Baylis* himself. The defence based upon the words "otherwise than by purchase for value" cannot be sustained unless the true construction of the whole covenant is that an incumbrance specially excepted from one class of acts and omissions covered by it is also excluded from the other classes, or, in other words, from the whole covenant. But such a construction is, in my opinion, inadmissible; it is inconsistent with the constant use of the disjunctive "or," which is employed in order to enlarge and not to diminish the acts and omissions covenanted against. Let us suppose that the term had been granted, not to *Baylis*, but to a third person who created incumbrances, and then, concealing them from *Sabin*, surrendered the term to him, and that he then conveyed the fee to *Baylis*, who afterwards conveyed it to the Plaintiff. Had that been the case the Defendant would, in my opinion, be plainly liable on his covenant. I cannot see that he is less so by reason of *Baylis* being the grantee of the term and the creator of the incumbrances.

It was also urged for the Defendant that the injury and damage to the Plaintiff were the direct result of what *Baylis* did, and not of what the Defendant did, and that the damages suffered by the Plaintiff were too remote to be attributable to the Defendant's breach of his covenant. But the damages sustained by the Plaintiff are directly occasioned by the inability of the

C. A. 1893 DAVID v. SABIN. Lindley, L.J.

Defendant to make a good title, and that inability arises from his own act as well as from the acts of a person claiming through him, as already pointed out. From this point of view the damage sustained by the Plaintiff is not too remote.

Having for the above reasons arrived at the conclusion that upon the true construction of the covenant *Sabin* has committed a breach of it, I pass on to consider whether he can avail himself as against the Plaintiff of any defence which he would have at law against *Baylis* if *Baylis* were the Plaintiff in the action. Let us first consider the effect of *Baylis's* fraud on *Sabin* when *Sabin* conveyed the fee to him. The fraud committed by *Baylis* in concealing the incumbrances when he surrendered the term and took a conveyance of the fee did not prevent the fee from passing to himself. Moreover, the covenant for title contained in the deed conveying the fee was not void, but voidable only; it was *Sabin's* deed and covenant; *non est factum* could not have been pleaded by him to an action brought against him upon it even by *Baylis* himself: *Whelpdale's Case* (1). *Sabin* might have pleaded fraud and rescission of contract as a defence to such an action, or he could have brought a cross-action for damages against *Baylis*, or have counter-claimed for damages against him. But it is plain that *Sabin* could have no cross-action or counter-claim against the Plaintiff for damages; and rescission of the sale of the land to *Baylis* is not now possible, nor does the Defendant seek to rescind it. The covenant with *Baylis* was voidable against him, but became unavoidable after he sold to the Plaintiff. Let us next consider the position of the Plaintiff. The Plaintiff's right to sue in this case is a right to sue in his own name at common law as grantee of the estate in the land to which the benefit of the Defendant's covenant for title is an incident: see *Middlemore* v. *Goodale* (2). And, for the reasons I have already given, fraud on the part of the person through whom the Plaintiff claims cannot furnish a defence to an action on such a covenant, nor is there any case which shews that it can. Although the benefit of the Defendant's covenant with *Baylis* runs with the land, and the Plaintiff can sue on it, the fraud

(1) 5 Rep. 118 b.
(2) 1 Roll. Abr. 521, K. 6; S.C., Cro. Car. 503, 505; 1 Sm. L. C. 8th Ed. p. 87.

committed by *Baylis* on the Defendant was personal to *Baylis*, and does not run with the land, and does not in any way affect the Plaintiff. At one time I had some doubt whether the Plaintiff could be in a better position at law than the original covenantee through whom he claimed. But on reflection I have come to the conclusion that he is; for the right to sue at common law on a covenant running with the land depends on and is a consequence of the ownership in the land. The action is brought in respect of privity of estate as distinguished from privity of contract, and is not governed by the same rules as an action by the assignee of a covenant grounded on privity of contract: see *Lewis* v. *Campbell* (1); *Kingdon* v. *Nottle* (2) and *Thursby* v. *Plant* (3), which, however, was an action on the statute 32 Hen. 8, c. 34, by the assignee of the reversion against the lessee. In equity it is hardly necessary to observe that the Plaintiff's right to sue is unassailable. The Plaintiff is a purchaser for value of the legal estate without notice of *Baylis's* fraud, and the Defendant cannot set up any equitable rights based on such fraud as a defence to the action. The judgment, therefore, must be reversed and be entered for the Plaintiff, with costs here and below, and there must be an inquiry as to damages.

The result, although arrived at by technical reasoning, is conformable to good sense and justice; for *Sabin* in fact professed to convey more than he had a right to convey—viz., an estate free from incumbrances created by himself or by any person claiming under him. Subsequent purchasers, including the Plaintiff, paid for such an estate, but did not get it. As between the Plaintiff and the Defendant it seems, therefore, only right and just that the loss sustained by the purchaser should be borne by the vendor, although no blame is attributable to either of them. *Sabin*, in his turn, is entitled to redress against *Baylis*; but I fear that this right to redress has no practical value.

BOWEN, L.J.:—

That the benefit of the implied covenant created by sect. 7, sub-sect. 1 (A), of the *Conveyancing Act*, 1881, runs with the land,

(1) 8 Taunt. 715.
(2) 4 M. & S. 53.
(3) 1 Wm. Saund. 234, a and b.

C. A. 1893 DAVID v. SABIN. Bowen, L.J.

cannot be disputed. The real questions to be discussed are, first, whether there has been on the part of the Defendant a breach of this covenant, and, secondly, whether the Defendant can now avail himself of the fraud of *Baylis*, the Plaintiff's predecessor in title, as an answer to the action. After much consideration and some fluctuation of view, I find myself, in the end, of the same opinion as that which I entertained at the conclusion of the arguments.

At the outset, it is necessary to determine whether there has been any breach at all of the covenant. The learned Judge below held that there had been none, upon the ground that the incumbrances, consisting as they do of the sub-leases executed fraudulently by *Baylis*, were in no sense the act of the Defendant. But the point is not, as it seems to me, whether the incumbrances are themselves the act of the Defendant, but whether the Defendant's conveyance does all that the Defendant covenanted that it should. By virtue of sect. 7 he has covenanted that he had full power to convey notwithstanding anything done by himself. What has he himself done which is calculated to affect the virtue of his conveyance? In 1885 he parted with a term of years in the land and with the right of possession in the land during that term. But from his parting with the term, which he never reacquired, he would have a good fee simple in possession to convey to *Baylis*. He parted with it, and as he never got it back he was unable to convey the fee in possession. It is a mere conveyancing illusion to suppose that the Defendant ever by the so-called surrender of 1887 got back the term which he had granted so as to extinguish it. He only recovered it mangled by the sub-leases and shorn of all right to possession. During the time of the duration of these sub-leases he had no right of possession to give, yet he purported to sell it, and covenanted that he had a good title to do so notwithstanding his own acts. In opposition to this view, it was argued that the damage caused by the breach arose, not from Defendant's act in parting with the term, but from the incumbrances subsequently created by another person. But here, again, one must not lose sight of the real issue, which is not whether the act done by the Defendant in parting with the term led directly and as a natural con-

sequence to the damage suffered by the Plaintiff. No doubt, between the Defendant's parting with the term in 1885 and the damage occasioned to the Plaintiff, there was an intermediate cause, *novus actus interveniens*, without which no damage would have occurred. But the action is not for damage caused by what the Defendant has done in 1885, but for breach of a limited covenant of a later date for title, for quiet enjoyment, and for freedom from incumbrances. The Plaintiff has not got such title, is disturbed in his enjoyment, and is hampered by incumbrances, and the act of the Defendant in 1885 is a cause *sine quâ non*—an act notwithstanding which, or against which, the covenantee was to be secured.

The above interpretation of sect. 7, sub-sect. 1 (A), leads, no doubt, to some apparent anomalies. If the Defendant had never had any interest in the land before he acquired the term from *Baylis* in 1887, he would not have been liable for the mischief arising from those prior incumbrances. Is the Defendant, it will be asked, to be in a worse position because he had possessed the fee or the term, and since then parted with it in 1885 for a time to a person who defrauded him? Why, it will be said, is he to bear the burden of the fraud of another person in one case more than in the other? The answer seems to me to be that the Legislature has so chosen to enact. The language hardly admits of escape. What the Defendant has "done"—to use the expression of the section—was to part with the term and the right to possession. Let us, therefore, suppose that for the words "anything done" we were to substitute in the statutory covenant an equivalent, describing in detail the thing which has been actually done. The Defendant will then have covenanted to make a good title to the fee simple in possession, notwithstanding the fact that, in June, 1885, he parted with a term involving the right to possession itself. I answer, accordingly, the first inquiry, by saying that there has been a breach by the Defendant of the statutory covenant. His only answer can be that, though he parted with the term, he would have recovered it intact but for a fraud committed on him. This is not a defence to an action by a covenantee, except so far as the fraud disqualifies the Plaintiff from suing. There is, in clear words, a breach of covenant, but one

C. A. 1893 DAVID v. SABIN. Bowen, L.J.

which has been induced by a fraud; and it remains to be seen whether the Defendant can set up a defence founded on this fraud against a subsequent *bonâ fide* purchaser of the land.

We have to consider whether, if *Baylis* himself had been Plaintiff, he could, after the fraud which he had committed, have sued the Defendant in respect of such a breach; and, lastly, whether, if *Baylis* could not do so, the present Plaintiff is involved in any similar difficulty. A contract of sale procured by a purchaser's fraud is not void at law, but voidable. Even as against *Baylis*, the Defendant could not have pleaded that the contract of sale had been procured by fraud without also electing to rescind the contract as a whole and returning the purchase-money. A defrauded party cannot repudiate a contract in part only: he cannot pick out the plums of a bargain into which he has been misled and reject the remainder. But there is another and a different principle of law and equity which the Defendant, without rescinding the contract, might, as between himself and *Baylis*, have successfully invoked. No person can successfully sue for a breach of covenant when the breach has been occasioned by his own fraud. To take advantage of such a breach would be a dishonesty, and the maxim *Ex turpi causâ non oritur actio*, though usually applied to a different class of cases, in fact covers this. To hold otherwise would be to allow a man to recover damages through, and to make a profit out of, his own fraud. To any action on the covenant by *Baylis*, the Defendant might, therefore, have pleaded, not, indeed, that the contract was induced by *Baylis's* fraud—a plea which could only be pleaded on the terms of rescinding the contract as a whole—but that the breach of the contract had been induced by it. Such a defence, however, is one that would be personal to *Baylis*, a personal bar or exception only rendering him unfit in the eyes of the law to sue for this particular breach. And as *Baylis* could not sue for this particular breach, so neither could he assign his rights to be protected against this particular breach to another. If the present Plaintiff had simply been an assignee of the rights of *Baylis*, under his special covenant to be protected against this particular breach, the Plaintiff, as such assignee, could not have been in a better position than his assignor. But the Plaintiff is not suing him

as the assignee of a *chose in action*, but as the assignee of the land itself. His cause of action is based on the original liability of the covenantor to all persons into whose hands the land may come. As against such an assign of the land, no plea can prevail which is in the nature of a personal bar only to the original covenantee. It would, indeed, be a grave matter to add such an element of hidden danger to titles of landed property as would arise from sanctioning the idea that the covenants of a conveyance which run with the land cannot be invoked by a *bonâ fide* purchaser against some breach traceable to and caused by a fraud on the part of the original covenantee. The benefit of the covenants runs with the land; but the burden of the fraud does not. On this point, also, the argument of the Respondent seems to me, therefore, to fail; and the appeal must accordingly be allowed, and the order be drawn up in the form suggested by my Brother *Lindley*.

A. L. SMITH, L.J.:—

The facts may be shortly stated as follows: On the 24th of June, 1885, the Defendant *Sabin*, who, for the purposes of this case, may be taken as being owner in fee, granted to *Baylis*, a builder, a lease of certain land for the term of ninety-nine years. *Baylis* thereupon, to secure present advances, created three mortgages by way of sub-demise. On the 5th of January, 1887, *Baylis*, as beneficial owner and for valuable consideration, purported to surrender the term of ninety-nine years to *Sabin*, but fraudulently concealed from him the fact that he had created these three mortgages; and on the 16th of June, 1887, *Sabin*, as beneficial owner, believing that he was owner in fee, conveyed the land to *Baylis* in fee. *Baylis*, as beneficial owner, subsequently conveyed to the predecessor of the Plaintiff in fee, fraudulently concealing from him, as he had done from *Sabin*, the existence of the mortgages, which were then and still are subsisting. That both the Plaintiff and the Defendant could sue *Baylis* is undeniable; but *Baylis* is a bankrupt and not worth suing, and the question raised is whether the Plaintiff, as assignee of the estate from *Baylis*, can sue *Sabin* for breach of his covenant contained in the conveyance by him to *Baylis* of the 16th of June,

C. A. 1893 DAVID v. SABIN. A. L. Smith, L.J.

1887, wherein *Sabin*, "as beneficial owner," conveyed to *Baylis* in fee.

There is no question as to the covenant running with the land so as to enable the Plaintiff to sue upon it as assignee of the estate. The question is, whether *Sabin* has, in the circumstances above stated, committed any breach of his covenant with *Baylis*, and, if so, whether he can be sued by the Plaintiff for such breach. My Brother *Romer* has held that he has not, and hence the present appeal.

It becomes necessary to consider sect. 7, sub-sect. 1 (A), of the *Conveyancing and Law of Property Act*, 1881, for the covenant contained in this section is the covenant entered into by *Sabin* when he conveyed, "as beneficial owner," to *Baylis*. This section when applied to the admitted facts of the case reads as follows: 1. That, notwithstanding anything made, done, executed, or omitted, or knowingly suffered by *Sabin* himself, he had full power to convey the subject-matter as expressed to be conveyed to *Baylis*, *i.e.*, to *Baylis* in fee.

2. That notwithstanding anything made, done, executed, or omitted, or knowingly suffered by *Sabin* himself, the subject-matter should be quietly enjoyed by *Baylis*, and any person deriving title under him without any lawful interruption, (1.) by *Sabin* himself, (2.) by any one rightfully claiming through *Sabin*, (3.) by any person rightfully claiming through any one (other than a person who claims in respect of an estate subject whereto the conveyance is expressly made) through whom *Sabin* derives title other than by purchase for value. This last clause does not apply to the present case.

3. That *Sabin* would indemnify *Baylis* against all such claims, *i.e.* (1.), (2.), (3.), above stated.

4. That *Sabin*, and any person rightfully claiming any estate in the subject-matter (other than an estate subject whereto the conveyance is expressly made) through *Sabin*, would execute all lawful assurances.

It cannot be disputed that *Sabin* has covenanted with *Baylis*, (*a*) that he (*Sabin*) had not made, done, or executed anything which limited his full power to convey to *Baylis* in fee; and (*b*) that, notwithstanding anything made, done, or executed by

Sabin, *Baylis* and any person deriving title under him should quietly enjoy the subject-matter conveyed without lawful interruption by any one rightly claiming through *Sabin*. I have left out the words in the section "omitted or knowingly suffered," for the words "made, done, or executed" raise the point I have to consider. It is said that *Sabin* is liable upon this covenant, firstly, because *Sabin* had created the term for ninety-nine years in favour of *Baylis*, which he had never got in, and thus he had made, done, or executed that which limited his power of conveying in fee to *Baylis*; and, secondly, that by reason of *Sabin's* acts the mortgagees of *Baylis* could rightfully claim through *Sabin*, and thereby lawfully interrupt *Baylis* and those deriving title under him, that is the Plaintiff, in the quiet enjoyment of his estate. Now, it appears to me to be clear, if *Sabin* being owner in fee had created the term of ninety-nine years in favour of a third person, reserving to himself the reversion expectant upon the determination of the term, and before getting it in had conveyed as beneficial owner to *Baylis* in fee, that *Baylis* could have sued *Sabin* upon his covenant, because *Sabin* would then have made, done, or executed the very thing which disabled him from conveying to *Baylis* in fee. In such a case the reason why he had not got the term in would be immaterial, and it would be no answer for *Sabin* to say to *Baylis*, "I thought I had got it in, but have been deceived by the third person"; for if in fact he had not got it in, and had conveyed as beneficial owner to *Baylis* in fee, he (*Sabin*) would have broken his covenant with *Baylis*. I do not think that there can be any doubt as to this. But it is said that in the present case *Sabin* did not create out of his estate a term in favour of a third person, but did so in favour of *Baylis*, and the question arises, Does this fact cause that which otherwise would, in my judgment, have been a breach of the covenants if the term had been created in favour of a third person, not a breach when created in favour of *Baylis*? The breach is for having made, done, or executed precisely the same thing in each case whereby he (*Sabin*) was unable to convey the fee. My Brother *Romer* came to the conclusion that the act which incapacitated *Sabin* from conveying to *Baylis* in fee was not anything made, done, or executed by *Sabin*, but was the creation

C. A. 1893 DAVID v. SABIN. A. L. Smith, L.J.

of the mortgages by *Baylis*; and he likened the present case to a young man selling his estate in fee and then, fifty years afterwards, buying it back, after many dealings with it in the interval by the owner for the time being; and he said that under the covenant the young man would not be liable for such dealings when reselling as beneficial owner. In this I agree, for in such case the young man would not have made, done, or executed anything whilst he was retaining possession of his estate in the land whereby he was subsequently prevented from conveying in fee. But the present case is not the case of a man selling his estate out and out and afterwards repurchasing it, it having been dealt with by others in the meantime—in which case, I agree, the covenants would not apply; but it is the case of a man who, whilst he is owner of an estate in fee, carves out of it a term, retaining the reversion expectant upon the determination of that term in himself, and then conveying as beneficial owner in fee with the term created by him still outstanding.

It seems to me, with deference to the great experience of my Brother *Romer* in these matters, that the case put by him is not in point, for in the one case the vendor, whilst retaining possession of the estate, has done nothing to incapacitate himself from conveying the fee, whilst in the other he has. As I have before stated, if the vendor has made, done, or executed that which prevented him subsequently conveying as "beneficial owner" in fee—that is, as in this case, created the term—the reason why he has been unable to get the term in is immaterial when considering whether the covenant has been broken or not. In my judgment, whether the term was created in favour of a third person or in favour of *Baylis*, *Sabin* has committed a breach of his covenant. He has covenanted with *Baylis* that he had title to convey to him in fee free from incumbrances, whereas as a matter of fact he had not. Why, then, has he not broken his covenant? It appears to me that he has. But I agree, though he has broken his covenant, no effective action could be maintained by *Baylis* against him for such breach. First, because *Sabin* could have pleaded to such an action that he was induced by the fraud of *Baylis* to enter into the covenant, that he (*Sabin*) had rescinded the contract upon discovering the fraud, if he had

done so. Secondly, because *Baylis* could only have recovered nominal damages from *Sabin*. Though *Baylis* did not get the fee under the conveyance by *Sabin* to him of the 16th of June, 1887, as *Sabin* had covenanted, yet, coupling that conveyance with the conveyances which theretofore passed between *Sabin* and *Baylis*, as a matter of fact the fee which *Sabin* once had has passed out of him into *Baylis* and his nominees, and *Baylis's* damages would be *nil*; and, thirdly, *Sabin* in such action could have counter-claimed against *Baylis* upon the covenant which he gave when he purported to reconvey as beneficial owner to *Sabin* on the 16th of June, 1887, for any damages *Sabin* might sustain by reason of the breach of that covenant by *Baylis*. For these reasons, it appears to me that *Sabin* did commit a breach of his covenant with *Baylis*; but by reason of the personal acts of *Baylis*, *Baylis* is prevented from effectively prosecuting an action for such breach against *Sabin*.

The point now arises, whether a plaintiff who sues as assignee of the estate for breach of the covenant running with the land is prevented from suing the original covenantor, *Sabin*, for a proved breach of his covenant, because the original covenantee, *Baylis*, has committed personal acts which have prevented him from taking advantage of these breaches; or, in other words, is a plaintiff who sues as assignee of the estate for a proved breach of a covenant running with the land affected by defences purely personal to the original covenantee? In such an action the plaintiff does not sue by reason of privity of contract, but by privity of estate; and this differentiates this case from that put in argument, viz., that an assignee suing by reason of privity of contract is usually in no better position than his assignor. Lords Justices *Lindley* and *Bowen* have fully dealt with this point, and I have nothing to add to what has been said thereon; and for the reasons they have given, I am of opinion that the personal acts of a covenantee, *Baylis*, which would prevent him effectively suing his covenantor do not hinder an assignee who sues, not upon privity of contract, but upon privity of estate, from suing and recovering upon a breach of covenant committed by the original covenantor.

I now come to a further breach of covenant by *Sabin*, which

C. A. 1893 DAVID v. SABIN. A. L. Smith, L.J.

the Plaintiff claims that *Sabin* has also committed, namely, for quiet enjoyment. It is said that, by reason of *Sabin's* act in creating the term, the mortgagees of *Baylis*, rightfully claiming through *Sabin*, can lawfully interrupt the Plaintiff in the possession of his estate to which he derives title under *Baylis*, and that *Sabin* has covenanted against this. I can see no answer to this point, if it be the true view, as I think it is, that *Sabin* committed an act in breach of his covenant in creating and not getting in the term before he conveyed as beneficial owner to *Baylis* in fee. Suppose that the mortgagees were to bring ejectment against the Plaintiff, what defence would he have? They would produce their mortgage deeds, and prove that they were existing sub-demises of the term which *Sabin* when owner in fee had created. They would prove that *Baylis* had lawfully created these sub-demises when he did, and that they were valid and subsisting. What answer could the Plaintiff have to such an action? These mortgagees in their action against the Plaintiff would rightfully claim through *Sabin*, and would bring themselves within *Sabin's* covenant for quiet enjoyment to *Baylis* and those deriving title under him. It is true that *Baylis* fraudulently secreted the fact of the mortgages he had created from *Sabin*; but how could *Sabin* avail himself of this when sued by the Plaintiff upon his covenant for quiet enjoyment? He has covenanted for quiet enjoyment in the circumstances which exist irrespective of what might have been done by *Baylis*. If *Baylis* cheated the Defendant *Sabin* into making the covenant which he did, *Sabin* has his remedy against *Baylis* for his personal misdeeds; but still *Sabin's* covenant remains broken, and, in my judgment, for the reasons above given, the Plaintiff can sue *Sabin* upon it, and recover the damages which he has sustained by reason of its breach.

Solicitors: *Sanderson, Holland, & Adkin; Ward & Asplin.*

M. W.

In re BEDDOE.
DOWNES *v.* COTTAM.

C. A.
1892
Oct. 28;
Dec. 2.

[1892 B. 596.]

Practice—Appeal for Costs—Trustee—Rules of Supreme Court, 1883, *Order* LXV., *r.* 1—*Judicature Act*, 1873 (36 & 37 *Vict. c.* 66), *s.* 49 [*Revised Ed. Statutes, vol. xvii., p.* 86].

Costs incurred by a trustee in an action respecting the trust estate are not costs in the discretion of a Judge who did not try the action, within Order LXV., rule 1, but are charges and expenses incurred in the execution of the trusts; and if such a Judge acting in the administration of the estate makes an order as to such costs, his decision is subject to appeal.

Real estates were devised to trustees in trust for *S.* during her life, in such terms as gave her the legal estate, and after her death in trust to sell. *S.* desired to sell the estates under the *Settled Land Act*, and applied to the surviving trustee for the title-deeds. The trustee, acting under the advice of his solicitor, refused to give them up, and *S.* brought an action of detinue in the Queen's Bench Division, and recovered judgment against him with costs. The trustee took out an originating summons in the Chancery Division, and obtained an order for payment of the costs incurred in the action out of the trust estate:—

Held, that the costs of the action of detinue were not costs in the discretion of the Judge of the Chancery Division within Order LXV., rule 1, and that his decision was subject to appeal:

Held, also, reversing the decision of *Kekewich*, J., that the trustee, not having shewn reasonable cause for defending the action, was not entitled to retain out of the trust estate the costs of the action beyond the amount which he would have incurred by applying for leave to defend it.

Charles v. *Jones* (1) explained.

THIS was an appeal from an order of Mr. Justice *Kekewich*. The proceedings were commenced by an originating summons for the decision of a question which had arisen in the administration of the estate of *Sarah Beddoe*, deceased. The Plaintiff was *T. P. Downes*, the surviving executor and trustee of her will; and the Defendant was *C. B. Cottam*, a solicitor, one of the persons beneficially interested under the will. The question on which the opinion of the Court was required was whether the Plaintiff was entitled to retain and be paid out of the trust estate the costs of and relating to an action brought against him in the

(1) 33 Ch. D. 80.

C. A. 1892 *In re* BEDDOE. DOWNES *v.* COTTAM.

Queen's Bench Division by *Mary Ann Savage*, the tenant for life under the will, including in such costs all charges and expenses properly incurred by him as trustee in relation to such action.

Sarah Beddoe, by her will, dated the 29th of August, 1876, devised her real estate to *T. P. Downes* and another trustee, who was dead, in trust to permit and suffer *Mary Ann Savage* to receive the rents and profits during her life, and after her death in trust to sell the same and divide the proceeds among certain persons, of whom *C. B. Cottam* was one. The testatrix died in February, 1885. In 1889, *Mary Ann Savage*, being desirous of selling the estates under the *Settled Land Act*, claimed the deeds from *Downes*; but *Downes*, acting under the advice of his solicitor, refused to give them up. On the 1st of March, 1889, Mrs. *Savage* commenced an action of detinue in the Queen's Bench Division against *Downes*. On the 7th of March, 1889, *Downes*, through his solicitor, Mr. *Trow*, consulted counsel, who stated that he had come to the conclusion with some hesitation that Mrs. *Savage* was legal tenant for life under the will, and as such was entitled to the custody of the deeds. On the 25th of March, *Downes* obtained a further opinion, in which counsel suggested that a summons should be taken out in the action to stay it, for the purpose of an originating summons being taken out in the Chancery Division to determine the right to the custody of the deeds; and in the event of the summons in the action being unsuccessful, he recommended that an allegation should be inserted in the statement of defence that the Defendant had been advised that the point was doubtful, but submitted to act as the Court might direct. The summons was taken out to stay proceedings in the action, but was unsuccessful, and *Downes* then put in a defence containing the submission as suggested.

The action was tried before Mr. Commissioner *Philbrick*, at *Birmingham*, and judgment was given for the Plaintiff, with costs to be paid by the Defendant *Downes*.

The correspondence which passed between the solicitors for the parties is specially referred to in the judgment of Lord Justice *Lindley*.

The present summons was taken out against *Cottam*, who was appointed to represent the other persons interested in the pro-

ceeds of the residuary real estate of the testatrix. Mr. Justice *Kekewich*, who heard the summons, made the following order: "The Court, being of opinion that the amount of the taxed costs paid by *T. P. Downes* to the Plaintiff in the action in the Queen's Bench Division—*Savage* v. *Downes*—and also the costs of the said *T. P. Downes* in the same action as between solicitor and client, ought to be allowed to the said *T. P. Downes* as costs, charges, and expenses properly incurred, doth order that it be referred to the Taxing Master to tax the costs, &c., including in such taxation any charges and expenses properly incurred by him in relation to the trusts of the real estate devised by the will." *Cottam* appealed from this order.

The case was argued first on the 28th of October, and was re-argued on the 2nd of December on the question whether an appeal could be brought.

Cottam, in person, in support of the appeal:—

The Plaintiff was not justified in refusing to give up the deeds to Mrs. *Savage* and in defending the action which was brought against him on that account. If he thought there was any doubt as to right to the custody of the deeds he ought to have applied to the Court for its direction. The Plaintiff contends that this Court has no jurisdiction to entertain an appeal from the order of Mr. Justice *Kekewich* so far as the costs of the action are concerned, inasmuch as the costs were costs within the discretion of the Judge within Order LXV., rule 1 (1). But these costs were not costs in proceedings before Mr. Justice *Kekewich*, and, therefore, not within his discretion. They were costs

(1) Order LXV., rule 1, is as follows: "Subject to the provisions of the Acts and these rules, the costs of and incident to all proceedings in the Supreme Court, including the administration of estates and trusts, shall be in the discretion of the Court or Judge: Provided that nothing herein contained shall deprive an executor, administrator, trustee, or mortgagee who has not unreasonably instituted or carried on or resisted any proceedings, of any right to costs out of a particular estate or fund to which he would be entitled according to the rules hitherto acted upon in the Chancery Division: Provided also that, where any action, cause, matter, or issue is tried with a jury, the costs shall follow the event, unless the Judge by whom such action, cause, matter, or issue is tried, or the Court, shall, for good cause, otherwise order."

C. A. 1892 — *In re* BEDDOE. DOWNES *v.* COTTAM.

incurred in another Court, and were simply charges and expenses which the trustee might or might not be entitled to retain out of the estate. They were, therefore, the subject of appeal: *In re Chennell* (1).

Renshaw, Q.C., and *Lake*, for the Plaintiff:—

The costs properly incurred by a trustee in the execution of his trusts are within Order LXV., rule 1: *Charles* v. *Jones* (2). In that case the costs properly incurred by the mortgagee as mortgagee were clearly different from the costs of the action, and it was there held that as they had been allowed by the Judge there was no appeal from his decision. In the present case, if the trustee had been refused leave to retain his costs paid in *Savage* v. *Downes* out of the estate, he might have appealed; but the *cestui que trust* cannot appeal against the permission to retain them. If an appeal is allowed, we contend that the trustee was justified in defending the action. He acted *bonâ fide* and under legal advice. The learned Commissioner who tried the action expressed his opinion that his conduct was reasonable, and that his costs ought to be allowed out of the trust fund.

LINDLEY, L.J.:—

This is an appeal from an order of Mr. Justice *Kekewich* allowing the Plaintiff, a trustee, certain costs, charges, and expenses out of the estate. The Plaintiff was trustee of the will of a Miss *Beddoe*. She devised her real property to the Plaintiff *Downes* in trust to permit and suffer Mrs. *Savage* to receive the rents and profits during her life, and after her death upon trust to sell and divide the proceeds amongst various persons, of whom the Defendant *Cottam* is one. He is a solicitor; he was a nephew of Mrs. *Savage*, and was her solicitor. Miss *Beddoe* died in February, 1885, and, shortly after her death, Mr. *Trow*, as solicitor for the Plaintiff, applied to Mrs. *Savage* for the deeds of the trust property and received them from her. The rents were received by or were paid to Mrs. *Savage* for some years, and all went smoothly until February, 1889, when Mrs. *Savage*, or Mr. *Cottam* for her, thought it would be desirable that she as tenant for life should sell the

(1) 8 Ch. D. 492. (2) 33 Ch. D. 80.

trust property under the *Settled Land Act*. In order to sell the property *Cottam* wanted the deeds, and, on the 21st of February, 1889, he asked *Downes*, the trustee, for them. *Downes* applied to his solicitor, *Trow*, for advice. He told *Cottam* verbally on the 23rd of February, 1889, that he should advise his client not to give them up. On the 25th of February *Trow* asked *Cottam* for the authorities on which he said he relied in support of his client's claim to the deeds. On the 1st day of March, 1889, *Cottam* issued a writ in the name of Mrs. *Savage* against *Downes* in the Queen's Bench Division to obtain the deeds. On the 7th or 8th of March, 1889, *Trow* obtained counsel's opinion on the course to be pursued. His advice is partly contained in an opinion dated the 7th of March, 1889, and partly in a verbal communication made to *Trow's London* agents, and the effect of which is given in their letter to *Trow* of the 8th of March, 1889. On the 9th of March *Trow* wrote to *Cottam* as follows: "I beg to inform you as solicitor to the Plaintiff that Mr. *Downes* has been advised by counsel that the point as to the custody of the deeds is extremely doubtful, and that until it is decided who is the proper custodian of them I feel bound to advise him, as the surviving trustee, to retain them, and that they can be produced to your client for inspection at any time, or, if required for any definite purpose by her, they can be handed over to you as her solicitor on a proper undertaking being given for their return." On the 25th of March, *Trow* obtained another opinion from counsel, who advised a summons to stay the action on the Defendant's undertaking to obtain direction from a Judge in the Chancery Division. Counsel also advised on the kind of defence to be put in by *Downes* if the application to stay should be unsuccessful. Before the step thus advised could be taken, *Cottam*, on the 28th of March, 1889, wrote to *Trow* as follows: "At the interview I had with you this morning, in which I complained that you should have applied for a month's time to deliver your statement of defence with the object presumably of embarrassing the Plaintiff in the proposed sale of the property of which she is legal tenant for life under the will of Miss *S. Beddoe*, you stated that the words 'on a proper undertaking being given for their return,' in your letter to me of the 9th of

C. A. 1892 *In re* BEDDOE. DOWNES *v.* COTTAM. Lindley, L.J.

March, 1889, were intended by you to convey that in case of the sale of the property you would not have required the title deeds to be returned. I then told you that that was not the inference to be drawn from that letter, and that if you so intended and had so stated in plain words I should on my client's side have accepted the deeds, and the action could have been then stopped on payment of the very small costs then incurred. This I now repeat and say, that if you will pay the costs of the action to this time, I will accept the deeds in order to enable me properly to prepare for the sale, and to hand over the deeds to any purchaser or purchasers, though, in my opinion, my client's right to them is absolute without condition. You stated this morning you were going to take other proceedings as to the deeds, and that I should hear in a few days what they were. I deprecate the incurring of useless costs, and shall object to them being paid out of the estate. I have instructions to proceed with the sale without delay, and, if this offer be not accepted, must hold you responsible and your client for any damages caused by your non-acceptance, and I shall be glad of a reply by 11 to-morrow to this letter." Pausing here for a moment, it is, in my opinion, much to be regretted that Mr. *Downes* was not advised to hand over the deeds and put an end to the action by paying the costs of it up to that date. Had he done so, I do not believe that any Judge would have disallowed them out of the estate. Unfortunately, *Downes's* solicitor did not consult counsel again as to what ought to be done after the receipt of this letter, but acted on the advice he had previously received. On the 30th of March, he took out a summons to stay the action as advised. The summons was dismissed, and the costs were made costs in the action. This experiment therefore, failed, and the costs were increased by it. On the 9th of April, a defence such as had been advised by counsel was put in. This defence submitted the rights of the parties to the decision of the Court. Such a defence is common enough, and not without use in the Chancery Division in actions for the administration of trusts; but a submission by a defendant to act as the Court may direct is of no use in an action by a legal owner to enforce his legal rights adversely to a person who,

although he is trustee for others, is not a trustee for the plaintiff in that action.

On the 24th of April, after some correspondence, in the course of which *Cottam* more than once urged *Trow* to hand over the deeds and pay the costs of the action, the deeds were handed over to *Cottam* on an undertaking to return them if the property should not be sold. On the 13th of August, judgment in the action was given for the Plaintiff with costs; but the learned Commissioner who tried the case said that he saw no reason why the costs should not ultimately come out of the trust estate. Although the Commissioner had read the correspondence, he had not read the opinion of counsel; but if he had, I do not think his view would have been different. The costs of this action were taxed at £116 2*s.* 4*d.*, viz., £64 19*s.* 10*d.* Plaintiff's costs, and £51 2*s.* 6*d.* Defendant's costs. In August, 1891, Mrs. *Savage* died. Some of the property was sold in her lifetime and some not. On the 9th of February, 1892, *Downes* took out an originating summons for an order authorizing him to retain the above costs out of the trust estate. Mr. *Cottam*, as a residuary devisee, was made a Defendant to this summons, and he was appointed to represent the other residuary devisees, who were numerous. He opposed the summons, the costs of which have amounted to a considerable sum. The summons was heard by Mr. Justice *Kekewich*, and he authorized the payment of the costs of the action and of the summons out of the trust estate. From this order Mr. *Cottam* has appealed.

The first question which arises is whether any appeal lies from that order, and for reasons which I will give presently I am of opinion that an appeal does lie. The important sections and rules which we have to consider are the 49th section of the *Judicature Act*, 1873, and the Order LXV., rule 1. The 49th section of the Act of 1873 runs thus: "No order made by the High Court of Justice or any Judge thereof, by the consent of parties, or as to costs only, which by law are left to the discretion of the Court, shall be subject to any appeal, except by leave of the Court or Judge making such order." Therefore, we have to ascertain what costs only are by law left to the discretion of the Court. That is found by turning to Order LXV., rule 1.

C. A. 1892 *In re* BEDDOE. DOWNES *v.* COTTAM. Lindley, L.J.

[His Lordship read the rule and proceeded:—] Now, in the first place, it will be observed that neither in the Act nor in the rule is there a word said about charges and expenses, either of mortgagees or trustees. The 49th section relates to "costs only" which by law are left to the discretion of the Judge. Order LXV., rule 1, relates to costs only, but says that, "subject to the provisions of the Acts and these rules, the costs of and incident to all proceedings in the Supreme Court, including the administration of estates and trusts, shall be in the discretion of the Court or Judge." The object of introducing those words, "including the administration of estates and trusts," which are not found in the preceding order made under the *Judicature Act*, was really to emphasize the first part of the rule, and to check, and I think it has had the effect of checking, the old Chancery practice of giving costs out of the estate, almost as a matter of course, without the Judge exercising any discretion in each particular case, which he ought to do. Then what costs are there referred to? "Subject to the provisions of the Act and these rules, costs of and incident to all proceedings in the Supreme Court shall be in the discretion of the Court or Judge." What Court or Judge? I apprehend the meaning of the rule is quite obvious, that in every proceeding in the Court the costs of that proceeding are in the discretion of the Judge who has to deal with it—who has to try it. He knows the facts of the case, he knows the conduct of the parties and the nature of the controversy, and the costs of every proceeding are, therefore, placed in the discretion of the Judge who tries the proceeding. It does not mean that the costs in a proceeding are to be in the discretion of the Court or Judge before whom these costs may incidentally come, upon an application to have them borne by some fund or some person not before the Court in the proceedings in which they have been incurred—that is not the meaning of the rule. Although costs are costs when they are incurred, the moment you come to ask that they shall be borne as expenses by a particular fund, or by persons not parties to the proceedings in which they were incurred, they become, not costs, but charges and expenses, and when once you get them into the category of charges and

expenses this rule and this enactment do not apply to them. For example, the costs of the action of *Savage* v. *Downes* were in the discretion of the learned Commissioner who tried that case; they were discretionary with him, and in the exercise of his discretion he gave the successful party the costs, which of course he would do unless there was some reason for the contrary—still they were in his discretion. But when you ask a Judge in the Chancery Division to allow those costs to the Defendant who has been unsuccessful, those costs immediately assume the character of charges and expenses; they are not costs of the preceeding before the Chancery Judge who was asked to allow them. They are no more costs in that sense, no more costs in his discretion, than any other charges and expenses would be—such, for example, as charges and expenses incurred by trustees in taking advice, or in sales, or any abortive proceeding—all of which may be perfectly proper. I should have thought that on principle this was tolerably plain, had it not been for the case, which has been so much discussed in this argument, of *Charles* v. *Jones* (1). The view I am taking of the distinction between costs and charges and expenses was taken in the case of *In re Chennell* (2)—a decision, it is true, on the old rules, but which appears to me as applicable to the new rules as to the old. But *Charles* v. *Jones* certainly looked like a decision the other way, and it was not until we sent for the Registrar's book that the obscurity which arose from the report was cleared up. Order LXV., rule 1, makes all costs discretionary with the Judge who tries the proceedings in which the costs have been incurred; but then there is this proviso in favour of trustees and mortgagees, that they are not to be deprived in the discretion of the Judge of those costs to which they are entitled according to the settled rule which has prevailed. It is right, of course, that they should be allowed costs, charges, and expenses properly incurred against a mortgagor or mortgagee, and, therefore, if they are deprived of their costs, charges, and expenses properly incurred they can appeal. That was settled in the case of *Turner* v. *Hancock* (3), which was referred to in this argument.

(1) 33 Ch. D. 80.

(2) 8 Ch. D. 492.

(3) 20 Ch. D. 303.

C. A. 1892 *In re* BEDDOE. DOWNES *v.* COTTAM. Lindley, L.J.

Then comes the converse case of *Charles* v. *Jones* (1), in which a mortgagee who has been guilty of some misconduct was nevertheless allowed his costs against the mortgagor. The mortgagor appealed, and the Court of Appeal held, on the true construction of Order LXV., rule 1, that the mortgagor could not appeal because, although there was misconduct, the costs became costs within the discretion of the Judge who had ordered them to be paid by the mortgagor, or added to the security of the mortgagee, which is the same thing, and they were not within the proviso. There was in the judgment of Lord Justice *Cotton* a passage which looked as if some question had arisen about charges and expenses as distinguished from the costs, and that was the doubt which induced us to have the case put in the paper again in order that it might be investigated; but when you come to look at that case, I do not think the point before us was before the Court in *Charles* v. *Jones*, nor was it involved in the decision. The controversy was whether the mortgagor could appeal against costs allowed to the mortgagee who had misconducted himself. Then we found in Vice-Chancellor *Bacon's* order, which was under appeal, a direction that the costs of the mortgagee properly incurred should also be allowed. There was no controversy there, as there is here, as to the propriety of any costs or expenses or charges—that was not the point at all, but the suggestion was that the Judge had gone too far. The answer of the Court of Appeal was, No. Therefore, notwithstanding there was an ambiguity, which is removed when you look at Vice-Chancellor *Bacon's* order, it appears to me that *Charles* v. *Jones* is not an authority against the appeal in this case, and on principle, on the true construction of the Acts and rules, it appears to me that the appeal lies.

Having arrived at this conclusion on the right of appeal, we must proceed to consider what ought to be done and whether the order appealed from is right or wrong. The order appealed from is this: "The Court doth order that it be referred to the Taxing Master to tax the costs of the Plaintiff *Downes* of the said action"—that is the action at law unsuccessfully defended

(1) 33 Ch. D. 80.

C. A. 1892

In re BEDDOE. DOWNES *v.* COTTAM.

Lindley, L.J.

by him against Mrs. *Savage*—"and also his costs of this application"—that is the summons to have those costs out of the estate—"including the costs of the application for the cross-examination of the Plaintiff as between solicitor and client"; and then there is this addition, "Including in such taxation any charges or expenses properly incurred by him in relation to the execution of the trusts." There is no appeal against that—that is right enough, of course; but the appeal is against that part of the order of Mr. Justice *Kekewich* which allows the trustee the costs of the unsuccessful action at law, and as a consequence against that part of the order which directs the costs of the application to come out of the estate.

Notwithstanding the terms of the devise, Mrs. *Savage* was legal tenant for life and was entitled to the deeds, and no doubt ought to be thrown by the Court on this point. It is perfectly clear when the authorities are looked into. But no trustee could be reasonably expected to know this; and no solicitor can be blamed for not seeing at a glance what the rights of the parties were. *Trow* himself thought *Cottam* was right; but *Trow* did not act unreasonably in taking time to consider, nor in consulting counsel, nor in being guided by him rather than by his opponent *Cottam*. But a trustee who, without the sanction of the Court, commences an action or defends an action unsuccessfully, does so at his own risk as regards the costs, even if he acts on counsel's opinion; and when the trustee seeks to obtain such costs out of his trust estate, he ought not to be allowed to charge them against his *cestui que trust* unless under very exceptional circumstances. If, indeed, the Judge comes to the conclusion that he would have authorized the action or defence had he been applied to, he might, in the exercise of his discretion, allow the costs incurred by the trustee out of the estate; but I cannot imagine any other circumstances under which the costs of an unauthorized and unsuccessful action brought or defended by a trustee could be properly thrown on the estate. Now, if in this case the trustee had applied by an originating summons for leave to defend the action at the expense of the estate, I cannot suppose that any Judge would have authorized him to do so. Consequently, I should not myself have allowed these costs out of the estate.

C. A.
1892
In re BEDDOE.
DOWNES *v.* COTTAM.
Lindley, L.J.

I entirely agree that a trustee is entitled as of right to full indemnity out of his trust estate against all his costs, charges, and expenses properly incurred: such an indemnity is the price paid by *cestuis que trust* for the gratuitous and onerous services of trustees; and in all cases of doubt, costs incurred by a trustee ought to be borne by the trust estate and not by him personally. The words "properly incurred" in the ordinary form of order are equivalent to "not improperly incurred." This view of a right of a trustee to indemnity is in conformity with the settled practice in Chancery and with *Turner* v. *Hancock* (1), the latest decision on the subject.

But, considering the ease and comparatively small expense with which trustees can obtain the opinion of a Judge of the Chancery Division on the question whether an action should be brought or defended at the expense of the trust estate, I am of opinion that if a trustee brings or defends an action unsuccessfully and without leave, it is for him to shew that the costs so incurred were properly incurred. The fact that the trustee acted on counsel's opinion is in all cases a circumstance which ought to weigh with the Court in favour of the trustee; but counsel's opinion is no indemnity to him even on a question of costs. This was decided in *Stott* v. *Milne* (2). In this case, I am compelled to say that counsel made a mistake in advising that there was any doubt about Mrs. *Savage's* right to the deeds; and *Trow* made a mistake in acting on a doubtful opinion and in not applying by an originating summons for leave to defend the action, as he was advised that he had a doubtful case. Under these circumstances, it appears to me that the order of Mr. Justice *Kekewich* allowing the whole costs of that unsuccessfully defended action out of the estate ought to be discharged, and that an order ought to be made more in accordance with what is just to the parties on both sides. The order which we think it right to make is this: Vary that order. As to the costs of *Savage* v. *Downes*, *Downes* ought only to have such costs as he would have incurred had he applied for leave to defend at the expense of the estate, and as we do not intend to have a further taxation or to have any further costs incurred about this un-

(1) 20 Ch. D. 303. (2) 25 Ch. D. 710.

fortunate matter, we shall fix them at £35. As to *Downes'* costs of his summons to get his costs out of the estate, he ought to be allowed a reasonable sum, say £20; but no more. As to *Cottam's* costs of this summons, he was right in appearing and in opposing the claim of *Downes*, and he has saved the estate thereby a considerable sum; but he has unnecessarily incurred expense. He ought to be allowed £20 for his costs of this summons out of the estate, and no more. As to the costs of the appeal, *Cottam* succeeds in part, and the estate has benefited by this. On the other hand, he asked for too much, and we propose to give him £10 as the costs of this appeal out of the estate; and there will be no other order as to the costs of the appeal.

BOWEN, L.J.:—

I also am of opinion that an appeal lies. The costs of the collateral action in the Queen's Bench become, in my opinion, charges and expenses when the trustee seeks to recoup himself for them in the administration of the trust. They were costs in their origin, but cease to be costs which are purely within the unappealable discretion of a Court when an attempt is made to fix them on the trust fund. Order LXV. rule. 1, directs that subject to the provisions of the Acts and the rules, the costs of and incident to all proceedings in the Supreme Court, including the administration of estates and trusts, shall be in the discretion of the Court. In order to understand the scope of this general rule which deals with the general subject of costs, and in order to see whether there is or is not an appeal as regards the subject-matter of his summons, one must look back to sect. 49 of the Act of 1873, which enacts that no order made by the High Court as "to costs only, which by law are left to the discretion of the Court" is to be subject to an appeal, except by leave. Unless an appeal in the present case is taken away by sect. 49, an appeal necessarily still lies. Were, then, these costs of the Queen's Bench action costs within the discretion of Mr. Justice *Kekewich*? They were costs as between the parties to the Queen's Bench action, and as between these parties were rightly dealt with by the Queen's Bench Judge. But when one of the parties to the Queen's Bench action endeavours to recoup himself for

C. A. 1892 *In re* BEDDOE. DOWNES *v.* COTTAM. Bowen, L.J.

them out of a trust fund, can they be said to be still costs within the meaning of sect. 49, and within the absolute discretion of the Judge who hears the application? So to hold would be to deprive *cestuis que trust* of an appeal upon the question whether the trustee was justified in defending a collateral action. In *In re Chennell* (1) the Master of the Rolls and the Court of Appeal pointed out that "charges and expenses" are not "costs" within sect. 49; and the present rule, Order LXV., rule 1, which is subsequent to *In re Chennell*, in still adhering, after that decision, to the former word, "costs," cannot be taken to include "charges and expenses" under it. Is it reasonable to sweep within the scope of a section dealing with general costs of actions the costs of an independent and collateral proceeding between third persons tried before a different Judge? If this were a question between principal and agent, can it be said that under this rule the costs incurred by an agent in an action brought or defended by him were as between himself and his principal to be within the absolute discretion of some other Judge who had not heard the case? The liability of the principal would depend on questions of pure fact. Why should the discretion of a Judge of the High Court conclude the matter? Why should the law be otherwise in the case of a trust fund? All matters in connection with trust funds are not made the subject of pure discretion of a Judge. They depend on questions of gravity involving controversies as to facts, and possibly legal questions of right. The fallacy of the Respondent's argument lies in supposing that because a trustee has to pay costs in a collateral suit, it is as costs that he inflicts them on his own trust fund. It is only as "charges and expenses" that he can recover them, and charges and expenses are not matters as to which an appeal is taken away, either under sect. 49 of the Act of 1873, or under Order LXV., rule 1. But it is said that the case of *Charles* v. *Jones* (2) decides that, although in such a case the trustee may appeal, the *cestuis que trust* may not. That case (rightly decided, no doubt, on the rules) nevertheless is one which inflicts some hardship on trust funds. If a trustee may appeal against an order finding that he has been guilty of misconduct, justice

(1) 8 Ch. D. 492. (2) 33 Ch. D. 80.

would seem to indicate that an appeal ought conversely to lie in the interest of infants and *cestuis que trust* where the decision is the other way. However, under Order LXV., rule 1, it is not so, and we ought not to stretch the words of the rule in order to apply such a hard doctrine to "charges and expenses" when the clear words seem in their ordinary sense to exclude them. But in truth, in *Charles* v. *Jones* (1), the point raised in the present case as to the lawfulness of an appeal did not really arise. The appeal prosecuted there was as to the misconduct of a mortgagee in the suit; and the Lord Justice *Cotton*, while holding that no appeal lay on behalf of the fund, intimated that that part of the order of Vice-Chancellor *Bacon* which directed that costs (in the sense of charges and expenses) properly incurred were to come out of the fund was regular; but he does not say that on the propriety of incurring such charges and expenses no appeal would lie. This case, therefore, is not in point. In my opinion, an appeal here lies, and I proceed to consider the present case on its merits.

If the present appeal fails what, we are told, amounts to nearly a quarter of a tiny trust fund will have been wasted with impunity in an unsuccessful litigation of no profit whatever to the trust; and the legal profession will have devoured, without any corresponding advantage to anybody, a considerable portion of a very small oyster. The Respondent was trustee of an estate such as I have described, and entitled in that capacity to a remainder in fee in trust for sale subject always to the previous life interest of a tenant for life. The tenant for life, who was herself meditating a sale of the property under the *Settled Land Act*, demanded—as she was entitled to do—possession of the title deeds. On the true construction of the will the trustee had no answer in law to the demand. But his solicitor entertained at the outset some doubt as to the law of the case—doubts which the result shewed to be unfounded. He did not take out any summons for directions from the Court, as he might have done, and thereby have avoided litigation; but on his own responsibility he defended the action down to the trial at the assizes, and was there defeated in the end. The vanquished trustee now

(1) 33 Ch. D. 80.

C. A. 1892 *In re* BEDDOE. DOWNES *v.* COTTAM. Bowen, L.J.

seeks to impose the costs of this idle and fruitless litigation on the estate under circumstances which I shall presently examine.

The principle of law to be applied appears unmistakeably clear. A trustee can only be indemnified out of the pockets of his *cestuis que trust* against costs, charges, and expenses properly incurred for the benefit of the trust—a proposition in which the word "properly" means reasonably as well as honestly incurred. While I agree that trustees ought not to be visited with personal loss on account of mere errors in judgment which fall short of negligence or unreasonableness, it is on the other hand essential to recollect that mere *bona fides* is not the test, and that it is no answer in the mouth of a trustee who has embarked in idle litigation to say that he honestly believed what his solicitor told him, if his solicitor has been wrong-headed and perverse. Costs, charges, and expenses which in fact have been unreasonably incurred, do not assume in the eye of the law the character of reasonableness simply because the solicitor is the person who was in fault. No more disastrous or delusive doctrine could be invented in a Court of Equity than the dangerous idea that a trustee himself might recover over from his own *cestuis que trust* costs which his own solicitor has unreasonably and perversely incurred merely because he had acted as his solicitor told him.

If there be one consideration again more than another which ought to be present to the mind of a trustee, especially the trustee of a small and easily dissipated fund, it is that all litigation should be avoided, unless there is such a chance of success as to render it desirable in the interests of the estate that the necessary risk should be incurred. If a trustee is doubtful as to the wisdom of prosecuting or defending a lawsuit, he is provided by the law with an inexpensive method of solving his doubts in the interest of the trust. He has only to take out an originating summons, state the point under discussion, and ask the Court whether the point is one which should be fought out or abandoned. To embark in a lawsuit at the risk of the fund without this salutory precaution might often be to speculate in law with money that belongs to other people. With these preliminary observations, I proceed to narrate succinctly the story of this wasteful litigation.

The Respondent, *Downes*, was created trustee under a will which devised the estate of the testatrix to himself and others in trust, to permit Mrs. *Savage* to receive the rents and profits during her life, and after her decease to sell and divide the proceeds amongst several persons, of whom the Appellant *Cottam*, himself a solicitor, was one. Mrs. *Savage*, who in 1889 was an old lady, and whose solicitor *Cottam* was, desired as life tenant to sell the trust property under the *Settled Land Act*, and for this purpose applied, in February, 1889, through *Cottam*, to *Downes*, the Respondent, for the deeds. Mr. *Trow*, the Respondent's solicitor, advised him not to comply with this request; and on the 1st of March *Cottam*, on behalf of the life tenant, issued a writ in detinue against the Respondent. With the tone and temper of *Cottam*, who acted for Mrs. *Savage*, I have no sort of sympathy. He was availing himself of her legal rights to deprive a brother solicitor of the conduct of sales which the trustee in the end would be bound to make as soon as Mrs. *Savage* died, and his language towards the Respondent's solicitor appears to have been overbearing, irritating, and offensive. But I cannot agree with the Respondent's counsel that the issue of the writ was premature. No such point was ever taken before the learned Commissioner in the action of detinue, and the judgment of the learned Commissioner states "that it must be taken as not denied upon the pleadings that there was a demand and a refusal to hand over the deeds." Indeed, in the letter of the 5th of March, written immediately after, the Respondent's lawyer admits the refusal to deliver up the deeds. That Mrs. *Savage* was entitled, as against the Respondent, to possession of the deeds, was in my opinion open to no doubt whatsoever. That a layman wholly unacquainted with the law might not be aware whether, on the true construction of the will, Mrs. *Savage* was so entitled is very possible. That even an experienced lawyer might wish to examine the authorities in order to instruct himself upon the point is also quite likely. The authorities however, when examined, are perfectly clear on the subject, and there is not a solicitor in the profession who, after consulting such authorities, might not have known that for the Respondent to defend the threatened action was, to say the least of it, a

C. A. 1892 *In re* BEDDOE. DOWNES *v.* COTTAM. Bowen, L.J.

dangerous thing, and calculated gravely to imperil the small trust fund. Mr. *Trow*, the Respondent's solicitor, appears on the issue of the writ to have become himself alarmed, and on the 5th of March wrote a letter with the view of obtaining counsel's opinion. He states in his letter that, according to the cases he has examined, the words of the will "appear to vest the legal estate in the tenant for life, which," he fears, "Mrs. *Savage* clearly is, within the meaning of the *Settled Land Act*," and he asks his *London* agents to say what they think is the best course for him to adopt. Counsel's opinion in reply states that "on the whole, though with much hesitation, I think that the latter view is correct, and that Mrs. *Savage* is legal tenant for life, and therefore entitled to the custody of the deeds." Counsel added that, as regards costs, if the question had been raised in the Chancery Division, the trustee would have had his costs out of the estate, and recommended an allegation to be added in the statement of defence in the action of detinue that Defendant had been advised the point was doubtful. Counsel did not, however, advise the action to be defended, or state that it could be defended with a fair prospect of success: nothing to that effect is to be found in the opinion.

Pausing here to review the situation, the following facts are clear. The Respondent, through his solicitor, now knew, on the 7th of March, that his counsel feared, as he himself did, that he was in the wrong. His counsel had not even advised him that the action might be defended with any reasonable prospect of success. What was the duty of any trustee of a tiny trust fund? What was the only reasonable course that could thereupon be pursued for the benefit of a fund of this description? Obviously, either to abandon the defence if he could not compromise, or take out an originating summons asking the direction of the Court. The smallness of the estate out of which costs if ordered would have to come, the character of the question at issue, the adverse impression of counsel, the sense that the authorities on the point were unfavourable: all these things, to my mind, made it absolutely and utterly unreasonable without further advice to risk the money of the *cestuis que trust* in a common law action about the custody of these deeds. And I see no possible

reason why the trustee did not accept the terms proposed to him in *Cottam's* letter of the 28th of March, even if he had not abandoned his defence before. The litigation pursued its course. A futile attempt was made to stay the common law action on the terms of taking out an originating summons in Chancery to have the question decided there, where the counsel believed the trustee would get his costs allowed out of the fund. A useless profession was made in the statement of defence of a willingness as soon as the Court of the Queen's Bench Division should pronounce judgment to submit to it—a pious expression of resignation to the will of the Court borrowed from Chancery, but wholly thrown away upon a common law action of detinue. And on the 13th of August at the assizes the learned Commissioner who sat as Judge decided the action against the Respondent, not expressing any doubt upon it. There was no appeal against his decision.

Reliance has been placed by the Respondent's counsel in this Court on the fact that in delivering judgment the learned Commissioner stated that if he had to deal with the matter on the materials before him he saw nothing unreasonable in the Respondent's conduct. The language of the learned Commissioner is as follows: "I have not to deal with the question, which will arise hereafter, whether the trustee is entitled to retain or charge these costs against his trust estate when that estate comes into his possession; but perhaps it is right that I should say that if I had to deal with the matter now I see nothing unreasonable in his conduct which ought to deprive him of them on the ground that he has acted in an unfair or improper manner, or done that which as trustee he was not warranted in doing. But that matter must be disposed of when it arises by the proper tribunal." The learned Commissioner had not before him the materials now before this Court, and the matter is at large for us. The view of Mr. Justice *Kekewich* in the Respondent's favour is a matter that has much impressed me. The note furnished to us of his judgment is imperfect; but I think Mr. Justice *Kekewich* has been influenced by the view that the solicitor of the Respondent had acted either under or not contrary to the opinion of counsel. He also expresses the opinion that the point of law was one of

C. A. 1892 *In re* BEDDOE. DOWNES *v.* COTTAM. Bowen, L.J.

difficulty. I am sensible of the experience of Mr. Justice *Kekewich* in these matters; but I am bound, when I have a clear view, to adhere to it, however I may differ from those of my Brethren whom I respect. As I have above stated, I myself do not agree that the point of law was difficult. It is a point with which a solicitor might well be unfamiliar. That I freely admit; but as soon as the authorities are examined the difficulty vanishes. Even if the point of law was difficult this does not, to my mind, justify, in the affairs of a small trust, defending an action of detinue in which the Respondent's solicitor and his counsel were both unable to bring themselves to believe that the Respondent would succeed without making some effort to obtain directions from the Court or to make terms with the Plaintiff. Any other view appears to me fraught with the utmost danger both to trust estates and to the practice of this Court. I think that up to the 9th of March the trustee was not acting unreasonably, although he was acting under a mistaken impression of his rights. From and after the 9th of March he was acting, in my opinion, most rashly and very unreasonably. He ought, I think, to be allowed out of the trust fund the costs directed by Lord Justice *Lindley*, but no more. This will relieve the trust fund of the burden placed on it by the order of the Court below, and I agree that the varied order which my Brother *Lindley* has stated is the correct one.

A. L. SMITH, L.J., concurred.

Solicitors: *Tucker, Lake, & Lyon*, agents for *A. P. Trow, Cleobury Mortimer; Cottam.*

M. W.

In re SIR E. HARVEY'S ESTATE. HARVEY *v.* GILLOW.

CHITTY, J.
1893
Jan. 17, 19.

[1892 H. 2010.]

Will—Lapse—Children as a Class—Issue taking by Substitution—Wills Act (1 *Vict. c.* 26), *s.* 33 [*Revised Ed. Statutes, vol. viii., p.* 36].

The rule that sect. 33 of the *Wills Act*, 1837, does not apply to gifts to children or grandchildren of the testator, as a class, is not affected by the fact that, in the events which happened, the class consisted of but one individual.

Principles of the decisions in *Olney* v. *Bates* (1), and *Browne* v. *Hammond* (2) discussed and applied.

Adjourned summons.

This was an application by the surviving trustee of the will of Admiral Sir *Edward Harvey*, for the purpose of ascertaining who was now entitled, in the events which had happened, to the one-fourth share of his residuary personal estate settled on his daughter, *Eliza Ann Emmerson*. The will, so far as material, and the facts, were as follows:—

The testator, by his will, dated the 10th of November, 1857, bequeathed his residuary personal estate to trustees, upon trust, as to one equal fourth part thereof, to pay the interest, dividends, and annual produce thereof unto his daugher, *Eliza Ann Emmerson*, the wife of *Richard Joynes Emmerson*, and her assigns, during the term of her natural life, and from and after her decease, as to the same one full equal fourth part of his said residuary personal estate, in trust for the child, if only one, or the children, if more than one, lawfully begotten, and to be begotten of his daughter, *Eliza Ann Emmerson*, who should, if a son or sons, live to attain the age of twenty-one years, or who should, if a daughter or daughters, live to attain that age or be married, to be divided between or among them, if more than one, in equal shares absolutely. And if there should be no such child of her his said daughter, who should if a son live to attain the age of twenty-one years, or if a daughter who should

(1) 3 Drew. 319. (2) Joh. 210.

CHITTY, J. 1893 *In re* SIR E. HARVEY'S ESTATE. HARVEY v. GILLOW.

live to attain that age or be married, then from and after the decease of her his said daughter, and subject to the trusts in favour of her child or children, as last aforesaid, upon trust to pay the interest, dividends, and annual produce of the said one-fourth part of his residuary personal estate unto the said *Richard Joynes Emmerson*, and his assigns during the term of his natural life, in case he so long remained unmarried, and from and after his decease or marriage again, which should first happen, and subject to the trusts in favour of his said daughter and her child and children, as last aforesaid, then upon certain other trusts for the benefit of the testator's other children.

The testator's daughter, *Eliza Ann Emmerson*, had one child only, a daughter, who attained twenty-one and married the Defendant *Alfred Gillow*, in October, 1863; Mrs. *Gillow* died in August, 1864, intestate, leaving one child, who survived the testator.

The testator died in May, 1865.

Eliza Ann Emmerson died in February, 1892, leaving her husband, the Defendant *Richard Joynes Emmerson*, her surviving. The Defendant *Alfred Gillow* contended, that upon taking out representation to his deceased wife, he was entitled to the one-fourth share settled on the testator's daughter, *Eliza Ann Emmerson*, and her children.

Church, for the surviving trustee of the will.

Farwell, Q.C., and *Dauney*, for the Defendant *Alfred Gillow*:—

The construction placed upon sect. 33 of the *Wills Act*, 1837, by *Olney* v. *Bates* (1) and *Browne* v. *Hammond* (2) is not applicable to the present case, where there is a lapse by failure of the class—the very thing sect. 33 was intended to provide for. In the case of a gift to a class of children, where some children survive, there is no lapse, apart from sect. 33; but in the present case, the class of children consisted of one only. The principle of *Olney* v. *Bates* must be confined to gifts to a class where some member of the class survives; the Vice-Chancellor says (3):

(1) 3 Drew. 319. (2) Joh. 210.

(3) 3 Drew. 323.

"When you arrive at the conclusion that there would have been lapse, then the statute applies, not otherwise"—that is the key-note of the decision. Mrs. *Gillow* left a child who survived the testator, and, unless sect. 33 applies, there will be a lapse. We submit that sect. 33 does apply, and that upon taking out administration the Defendant *Gillow* is entitled to this fourth share.

Further, we say, the gift here is equivalent to a gift to the individual grandchild, the words in the will being, "for the child if only one"; the daughter's child, therefore, being alive at the date of the will, was a *persona designata.*

Byrne, Q.C., and *G. M. Prior*, for one of the testator's other children:—

Sect. 33 of the *Wills Act*, 1837, applies only to cases of strict lapse, not to cases of gifts to a class; the reasoning in the judgment in *Olney* v. *Bates* (1) applies just as forcibly to a class consisting of one as to a class consisting of a dozen. The decision may be a rather strict interpretation of the 33rd section, but it is too late to question it now. The descriptive words, for "the child if only one," or the children if more than one, are not a designation of any particular child. There has, therefore, been a failure of this particular gift, and the subsequent limitations take effect.

Robertson-Macdonald, for *R. J. Emmerson*, adopted this argument.

Farwell, in reply.

1893. Jan. 19. CHITTY, J.:—

Olney v. *Bates* was decided by *Kindersley*, V.C., in 1855. The decision turned upon a consideration of the established law relating to a gift to a class in connection with the law of lapse. It may have been thought by some that the decision was founded upon too strict an application of these doctrines to the 33rd section of the *Wills Act*; and undoubtedly, as observed by

(1) 3 Drew. 319.

CHITTY, J. 1893 *In re* SIR E. HARVEY'S ESTATE. HARVEY *v.* GILLOW.

Jarman, as gifts to the testator's children as a class, are of frequent occurrence, their exclusion from this provision of the statute greatly narrows its practical operation (1). But the same point came in 1858 before *Wood*, V.C., in *Browne* v. *Hammond* (2), and he followed and adopted the decision in *Olney* v. *Bates* (3). These two authorities have put a construction on the 33rd section which has been since constantly acted upon by the Courts, and has never, so far as I am aware, been judicially called in question. The decisions appear to have been accepted by text-writers, subject only to the observation already cited, which, however, does not attempt to impeach their authority, but merely states their practical effect (4). It seems too late, after this lapse of time, for any Court to reopen the question then apparently settled, and upon which many titles doubtless depend: see the observation of Earl *Selborne* in *Holyland* v. *Lewin* (5). I certainly cannot, and I ought not to attempt to impair the decisions or to fritter away the principles, upon which they are founded. The difference between a gift to named individuals, and a gift to a class, in reference to lapse, is firmly established. A gift by will to a class is taken, in Law and in Equity, to be a gift, where it is immediate, to those only who survive the testator; and, where it is not immediate but postponed, to be a gift to those only who survive the testator, or come into being before the period of distribution. Take gifts to children: when the gift is to a child named, and he dies in the testator's lifetime, it fails to take effect, apart from the 33rd section. The reason of its thus lapsing is found in the ambulatory nature of a will, which does not come into operation until the testator's death; a deceased person cannot take under a will, just as a deceased person cannot take under a deed, which has an immediate operation. But where the gift is to children as a class, to take as tenants in common, a child dying in the testator's lifetime, was excluded by the law as it stood before the passing of the *Wills Act*; and, according to

(1) 1 *Jarman* on Wills, 4th Ed. p. 353.
(2) Joh. 210.
(3) 3 Drew. 319.
(4) 1 *Jarman* on Wills, 4th Ed. p. 353; and *Theobald*, 3rd Ed. p. 558.
(5) 26 Ch. D. 266, 271.

the decisions already cited, the 33rd section does not apply, although the child leaves issue that survives the testator. The principle acted upon was, that the section leaves the construction of these class gifts unaltered; and that these gifts are still to be read as gifts to those only who survive, and not as gifts to the possible members of the class who die in the testator's lifetime; and that the gift, in regard to those children who so die, is not to be treated as a gift to individuals. The distinction between gifts to individuals and to a class is, if I may use the expression, engrained in the law; it is well illustrated by *Leake* v. *Robinson* (1) and the numerous subsequent decisions on the same point, including *Pearks* v. *Moseley* (2) in the House of Lords. This distinction formed the ground of the decision in *Olney* v. *Bates* (3) and *Browne* v. *Hammond* (4). *Kindersley*, V.C., laid it down that the effect of the devise which he had under consideration, was to give to children living at the death, and "therefore," as he says (5), "there was no gift to Mrs. *Foster*, and the statute only applies to the representatives of children or issue to whom something is given." *Wood*, V.C., concurs in this opinion, and says expressly (6) that a gift to children as a class is not within the 33rd section, and he goes on to explain, that knowledge of the law as to the operation of a gift to a class, must be imputed to a testator.

But it was contended in the case before me that the section does apply, because there was, in the events which happened, no child of the testator's daughter, Mrs. *Emmerson*, who took under the gift to her children; consequently, as it was urged, there was a lapse, and the authorities therefore did not apply. Mrs. *Emmerson* had in fact one child only, a daughter, who died in the testator's lifetime, leaving issue who survived the testator. But this contention is, when examined, only asking me in another form to hold that the gift to the testator's daughter's children, as a class, is in effect a gift to individuals. Mr. *Dauney* felt this; he raised an argument upon the construction of the will which, although it was untenable, and presently

(1) 2 Mer. 363.
(2) 5 App. Cas. 714.
(3) 3 Drew. 319.
(4) Joh. 210.
(5) 3 Drew. 323.
(6) Joh. 214.

CHITTY, J.
1893
In re SIR E. HARVEY'S ESTATE.
HARVEY v. GILLOW.

abandoned, is worth noticing. He fastened on the words "for the child if only one" at the beginning of the gift to the daughter's children, and said that the daughter's child living at the date of the will was a *persona designata* by these words. The answer is simple: these words of amplification do not make the gift the less a gift to a class. A gift to all the testator's grandchildren as tenants in common would, without such words, carry the whole property to an only child; and if the daughter had had an after-born child, who being a son had attained twenty-one, or being a daughter had married, that child would unquestionably have taken Mrs. *Emmerson's* share, and would, just as much or as little, have been an only child within the words relied on. The descriptive words are not a designation of any particular child. In truth, I am asked to depart from the principle of the two decisions cited by holding that the gift to the grandchildren has lapsed by reason of the death of a possible member of the class in the testator's lifetime. It is not correct to say that it has lapsed for that reason; it has failed to take effect by reason of there being no grandchildren to take—by reason of Mrs. *Emmerson* (who survived the testator) not having had any children or child answering the description. It was impossible to say that the gift had failed until Mrs. *Emmerson*, who might have had other children, had herself died. Moreover, if I acceded to the contention of the Defendant *Gillow*, extraordinary anomalies would result. If a testator had several children, say five, living at the date of his will, and four of these died in his lifetime leaving issue who survived him, the effect of the decisions is that the fifth child surviving would take the whole; but if that child also happened to die in the testator's lifetime, leaving issue who survived him, the representatives, not only of the fifth child, but of all the other four children, would, according to the Defendants' argument, be let in, and in equal shares. And further, if there had been a sixth child who had died before the date of the will leaving issue who survived, the representatives of the sixth child, who by no possible construction of the will could himself have taken, would be inevitably let in to share with the representatives of his brothers and sisters, all dying as above supposed.

For these reasons, I am unable to hold that the representative of the deceased granddaughter, Mrs. *Gillow*, can take anything under this will.

Solicitors: *Prior, Church, & Adams*, agents for *Emmerson & Co., Sandwich; Speechly, Mumford, Landon, & Rodgers.*

W. C. D.

NORTH, J.
1892
Dec. 20.

EDWARDS *v.* STANDARD ROLLING STOCK SYNDICATE.

[1892 E. 1581.]

Company—Debenture-holders' Action—Appointment of Receiver and Manager—Floating Security on whole of Company's Property—Interest not in Arrear.

A company issued debentures by which they charged their undertaking and the whole of their property, present and future, including uncalled capital, as a first charge which was to be a "floating security." In an action by the debenture-holders to enforce their security, the principal not having become due, and interest not being in arrear, but the company consenting, and there being evidence that execution had been levied by a judgment creditor upon goods of the company comprised in the debenture-holders' security, and that other actions by creditors against the company were pending:—

Held, on the authority of *Wildy* v. *Mid-Hants Railway Company* (1), that a receiver of the company's property comprised in the debentures could be appointed:

Held, also, on the authority of *Makins* v. *Percy Ibotson & Sons* (2), that a manager of the company's business could be appointed.

MOTION by the Plaintiffs for the appointment of a receiver of all the property and assets of the Defendant company comprised in or subject to the mortgage debentures of the company, and to manage and carry on the business of the company comprised in the debentures.

The Plaintiffs, *B. Edwards* and *S. W. Hadingham*, sued "on behalf of themselves and all other the holders of mortgage debentures of the Defendant company." By the writ in the action, which was issued on the 16th of December, 1892, the Plaintiffs claimed, as debenture-holders of the company, (1.) a declaration that the mortgage debentures issued by the company, and then outstanding, constituted a first charge upon all the property of the company; (2.) to have an account taken of what was due and owing to the Plaintiffs and the other debenture-holders of the company under or by virtue of their debentures; (3.) to have the debentures enforced by foreclosure or sale; (4.)

(1) 16 W. R. 409.

(2) [1891] 1 Ch. 133.

to have a receiver and manager of the company's property appointed.

The notice of motion was given on the 16th of December.

The Plaintiffs were originally the holders of fifty debentures (the whole number issued), each for the sum of £100, and at the time of the issue of the writ they still held forty-seven of them.

By each debenture the company covenanted with the registered holder thereof for the time being that they would, on the 30th of June, 1894, pay to such registered holder the sum of £100, with interest thereon in the meantime at the rate of 6 per cent. per annum, by equal half-yearly payments on the 1st of January and the 1st of July in each year. And the company did thereby charge with the payment of the said sum of £100 and interest its undertaking and all its property, real and personal, present and future, including book debts and its uncalled capital, if any, for the time being.

Each debenture was issued upon and subject to certain conditions indorsed thereon.

The material conditions for the present purpose were as follows:—

1. "This debenture is one of a series of fifty like debentures, numbered consecutively from 1 to 50 inclusive, issued by the company on the —— day of ——, 18—, for securing principal sums amounting to £5000, and registered in the books of the company.

2. "The said debentures of the said series so numbered shall rank *pari passu* as a first charge upon the whole of the undertaking of the company, as within mentioned, without any preference or priority one over the other.

3. "The charge created by the debentures shall be a floating security, and accordingly the company may in the course of its business, and for the purpose of carrying on the same, deal with the property hereby charged in such manner as the company shall think fit, and may lease the same, and may pay and receive money, and declare and pay dividends out of profits. But the powers hereby given shall cease if default is made in the payment of any principal moneys secured by any of the series of debentures at the time when the same become payable or if

NORTH, J. 1892 EDWARDS v. STANDARD ROLLING STOCK SYNDICATE.

default is made in the payment of any interest payable on any of the said series of debentures at the time fixed for the payment thereof, or if an order of some Court of competent jurisdiction is made, or a special or extraordinary resolution is passed, for winding up the company.

4. "The debentures shall constitute and be a first charge on the undertaking and property of the company, and nothing herein contained shall be taken to authorize the creation of any mortgage or charge on the undertaking, or any of the property for the time being of the company in priority to the charge hereby created."

In support of the motion the Plaintiffs made an affidavit, in which they said that several actions brought by creditors against the company were pending, and that in one of those actions judgment had been recovered against the company by one *Roberts*, and execution had, on the 12th of December, been levied by the sheriff on goods and chattels of the company comprised in the debentures. The Plaintiffs had served notice on the sheriff, informing him that the goods and chattels which he had seized were charged by the debentures of the company held by the Plaintiffs, but, notwithstanding the notice, the Plaintiffs had been informed and they believed that the sheriff intended to proceed to a sale of the goods which he had seized, unless he was restrained by the Court.

The company appeared by counsel and consented to the motion.

Macnaghten, for the Plaintiffs:—

Though there is nothing yet due in respect of the debentures, yet the Court will protect the Plaintiffs' security by the appointment of a receiver: *McMahon* v. *North Kent Ironworks Company* (1).

[NORTH, J.:—In *Legg* v. *Mathieson* (2) the plaintiffs were in the position of ordinary mortgagees. Their security was not a "floating" one, as in the present case. I feel a difficulty in interfering with the right of ordinary creditors to levy execution.]

(1) [1891] 2 Ch. 148.

(2) 2 Giff. 71.

In *Legg* v. *Mathieson* (1) the plaintiffs' charge was really upon floating assets, upon the undertaking of the company from time to time. It was not like an ordinary mortgage of definite property, such as a house. Though a security upon floating assets is not what may be called "crystallized" till the debenture-holders take steps to enforce it, still it is a subsisting charge upon the assets: *Wildy* v. *Mid-Hants Railway Company* (2); *In re Standard Manufacturing Company* (3).

Oswald, for the company, consented to the motion.

NORTH, J.:—

I must follow *Wildy* v. *Mid-Hants Railway Company*, in which, at the instance of debenture-holders, who were mortgagees of the undertaking of the company, Lord Chancellor *Chelmsford* held that a receiver of the undertaking could be appointed, though the mortgage money had not become due when the bill was filed.

Macnaghten:—

I ask also that the receiver may be appointed manager of the company's business. *Makins* v. *Percy Ibotson and Sons* (4) is an authority for making the appointment.

NORTH, J.:—

I will follow that case, though, as Mr. Justice *Kay* said there, I make the appointment with great hesitation.

Solicitors: *Bower, Cotton, & Bower*, agents for *J. S. Bradstock, Cinderford; George Weller*, agent for *Andrew Parker, Newnham-on-Severn.*

(1) 2 Giff. 71.
(2) 16 W. R. 409.
(3) [1891] 1 Ch. 627.
(4) Ibid. 133.

W. L. C.

STIRLING, J.

1893

Jan. 13.

COLLINS *v.* BARKER.

[1892 C. 4517.]

Partnership—Articles—Provision for Cesser of Partnership on Bankruptcy, and Retention of Bankrupt Partner's Share—Invalidity—Receiver and Manager—Terms of Appointment.

Articles of partnership provided that the partnership should continue for fourteen years from the 1st of January, 1891; that if any partner should die or become bankrupt, he should be deemed to have ceased to be a partner on the date of such death or bankruptcy, and his share in the capital should remain as a loan to the surviving or continuing partners or partner during the residue of the term of fourteen years, or during such shorter period as they should carry on the business, either alone or in partnership with others, bearing interest at 5 per cent., and the payment of the said loan with interest should be secured by the joint and several bond, or the bond or covenant of the surviving or continuing partners or partner.

The partnership firm consisted of a father and his three sons, of whom the Defendant was the youngest. The whole of the capital was provided by the father.

In June, 1892, the father and the two elder sons became bankrupt, and the trustees in their bankruptcy brought an action against the Defendant for a declaration that the provisions of the articles under which the Defendant claimed to retain as a loan the respective shares of the bankrupts in the capital of the partnership were void as against the creditors of the bankrupts, and moved for the appointment of a receiver and manager of the partnership business. The Defendant claimed the right, as solvent partner, to be appointed receiver and manager:—

Held, that the Defendant was entitled to be appointed receiver and manager; but that he must give security, pass his accounts, furnish the Plaintiffs with proper accounts, allow them all reasonable access to the books, and pay the balances in his hands, as and when they reached a certain amount to be agreed upon, into Court, or into a joint banking account of the Plaintiffs and himself.

Motion.

This was a motion on behalf of Plaintiffs, the trustees in bankruptcy of *George Barker*, *Hilton Barker*, and *William Barker*, asking that a receiver and manager might be appointed of the business of distillers and wine and spirit merchants, lately carried on by them in partnership with the Defendant, *George Ernest Barker*.

The affairs of the partnership were regulated by articles dated the 14th of August, 1891, which provided that the partnership should continue for the term of fourteen years, from the 1st of January, 1891.

Clause 21 of the articles provided that if any partner or partners should retire or should become bankrupt, he or they should be deemed to have ceased to be a partner or partners on the day of the date of such retirement or bankruptcy, as the case might be.

Clause 22 provided that upon the death of any partner or upon any partner or partners ceasing to be a partner or partners from any cause whatever before the expiration of the partnership, such partnership should thereupon determine as to such partner or partners, and the share of such deceased or outgoing partner or partners should as from his or their death or ceasing to be a partner or partners vest in and belong to and be purchased by the remaining partners or partner, and if more than one in shares proportionate to their then shares in the profits of the business; and then, after providing for the payment of interest to an outgoing partner or his representatives on his share of the capital of the partnership, and also for the ascertainment and payment of his share of the profits, or an allowance in lieu thereof, the clause continued: "And his or their share or respective shares in the capital of the partnership shall remain as a loan to the surviving or continuing partners or partner during the residue of the said term of fourteen years, or during such shorter period as such surviving or continuing partners or partner shall carry on the said business either alone or in partnership with any other persons or person in accordance with the provisions of these presents, bearing interest at the rate of £5 per cent. per annum, payable on the usual quarter days; and the payment of the said loan at the end of the said period, together with interest thereon as aforesaid, shall be secured to the outgoing partners or partner, or his or their representatives, as the case may be, at the expense and by the joint and several bond or the bond or covenant of the surviving or continuing partners or partner."

The business was originally established and the whole of the capital had been provided by *George Barker*, who was the father of the other three partners, of whom the Defendant was the youngest.

STIRLING, J. 1893 COLLINS v. BARKER.

Prior to the articles of 1891, it had been carried on by *George Barker* and his two elder sons, and the Defendant was admitted as a partner for the first time in 1891. He did not bring any capital into the business. *George Barker* and his two elder sons had been engaged in banking and other businesses besides that of the partnership, and in June, 1892, they became bankrupt. The Plaintiffs claimed in this action a declaration that the provisions of the articles of partnership, under which the Defendant claimed to retain as a loan the respective shares of the bankrupts in the capital of the partnership, were void as against the Plaintiffs and the creditors of the bankrupts. They also asked to have the partnership accounts taken, and that the partnership business might be wound up, and the assets realized under the direction of the Court.

The partnership articles were prepared by another son of *George Barker*, who was a solicitor, and there was evidence to shew that at the time of such preparation the other businesses in which *George Barker* and his two elder sons were then engaged were insolvent.

The Defendant and *George Barker* both stated in their evidence that they were not aware how the clause in question came to be inserted in the articles. The Defendant said that he knew of its insertion, but thought that its object was to provide for the case of his father's death, and to avoid the necessity of paying out his father's share of the capital in that event.

Hastings, Q.C., and *Eve*, for the motion:—

The provisions of the articles—clause 22 in particular—amount to a fraud on the bankruptcy laws. A contract between partners that in the event of the bankruptcy of one of them the other shall get some additional advantage which will avoid a distribution of the partnership property under the bankruptcy law, is illegal: *Higinbotham* v. *Holme* (1); *Ex parte Mackay* (2); *Whitmore* v. *Mason* (3); *Wilson* v. *Greenwood* (4); *Lindley* on Partnership (5).

(1) 19 Ves. 88.
(2) Law Rep. 8 Ch. 643.
(3) 2 J. & H. 204.
(4) 1 Swans. 471.
(5) 5th Ed. pp. 433, 647.

If effect be given to the clause in question, the continuing partner will be able to keep the creditors of the bankrupt out of their property for several years. This is not a provision merely for ascertaining the value of a partner's share, it is a provision for retaining it in the business. The whole of the capital was contributed by *George Barker*, and we submit that the applicants are entitled to the appointment of a receiver. There is no objection to the Defendant continuing as manager, but we ask to have another person appointed receiver either alone or jointly with him.

Buckley, Q.C., and *Vernon R. Smith*, for the Defendant:—

We do not dispute the principle laid down by *James*, L.J., in *Ex parte Jay* (1); that a simple stipulation that upon a man's becoming bankrupt, that which was his property up to the date of the bankruptcy shall go over to some one else, and be taken away from his creditors, is void as being a violation of the policy of the bankrupt law; but that is not this case. *Wilson* v. *Greenwood* (2) is most like the present case, but there the provision as to the share of a bankrupt partner was contained, not in the original articles, but in a subsequent deed, and the Lord Chancellor declined to say whether, supposing the original deed had provided for the dissolution of the partnership by bankruptcy, as it had provided for the dissolution by other means, that provision would have been good. That decision does not, therefore, conclude the present case. There is no principle upon which an agreement that the share of a bankrupt partner shall be purchased by the other partners is necessarily void. The creditors are not injured by such a provision, no property being taken away from them. An arrangement that the continuing partners shall be debtors to the trustee in bankruptcy of the insolvent partner for the amount of his share, and pay it by instalments, with interest, spread over a term of years, is not taking away any property from the creditors; it is only a method of realisation. It is no more depriving the creditors of anything than a sale of the bankrupt's share at a valuation would be. The Plaintiffs have no right to deprive the Defendant, who is a solvent partner, of the manage-

(1) 14 Ch. D. 19. (2) 1 Swans. 471.

STIRLING, J. 1893 COLLINS v. BARKER.

ment of the business. As a solvent partner he has a perfect right to administer the assets, unless there is some good reason for depriving him of that right. If disputes arise between him and the trustee, the Court will appoint him receiver: *Lindley* on Partnership (1); *Ex parte Stoveld* (2); *Freeland* v. *Stansfeld* (3). The Plaintiffs have not shewn any good cause for removing the Defendant, and he is prepared to give security upon being appointed receiver.

Hastings, in reply:—

[STIRLING, J.:—I think a case has been made for the appointment of a receiver. The only question is as to the terms of the appointment.]

We ask for the appointment of some one jointly with the Defendant. Under the articles everything is left in his hands, and there is no check upon him. He might even decline to furnish us with accounts, and we wish to avoid the expense of an application to compel him to do so.

STIRLING, J. (after stating the facts, continued):—

Clause 22 is a remarkable one to apply in the case of a bankruptcy, especially when the term of the duration of the partnership is considered. If the clause is valid, the creditors of the bankrupts will be kept out of their share of the partnership property for about 13 years, and will have no security for it except the bond or covenant of the Defendant, who did not bring one shilling into the business. It may be that Mr. *Buckley* is right in saying that some of the authorities cited do not apply, but it seems to me that the case of *Wilson* v. *Greenwood* (4) on the ground on which it was decided by Lord *Eldon*, has considerable application. In that case articles of partnership dated in 1812, provided that on dissolution by death, notice, or misconduct of a partner the remaining partners should have the option of taking his share at a valuation, payable by yearly instalments in the course of seven years; and that on the bankruptcy or insolvency of a partner the partnership should be immediately

(1) 5th Ed. pp. 669, 670.
(2) 1 G. & J. 303.
(3) 2 Sm. & Giff. 479.
(4) 1 Swans. 471.

void as to him; and that upon the ceasing of the partnership, the partnership accounts should be taken, and the property sold, and the residue, after payment of debts, divided between the parties. So that the articles provided that, in the event of a bankruptcy, there should be a winding-up of the partnership in the usual way. In 1816, the partners executed another deed, in which they recited that they conceived that they had not by the articles (though their original intention was so to do) sufficiently provided for the case of solvent partners continuing to carry on the business after the bankruptcy or insolvency of one of the partners. They then made the clause in the original deed, applicable to dissolution by death, or withdrawal of a partner under his own notice, applicable in all cases of partial dissolution wherein one only of the parties should withdraw from the co-partnership or cease to have any interest therein, whether the same should happen with or without his consent in any manner. They therefore made the clause in question applicable in the case of a bankruptcy of one of the partners. About four months after the execution of this deed one of the partners became bankrupt. His assignees asked for a declaration that the partnership was determined, and that they were entitled to have the assets realized. One of the partners stated in an affidavit that the deed of 1816 was executed without any fraudulent intention. Lord *Eldon* said (1): "The first question is, whether, supposing the original deed had provided for the dissolution of the partnership by bankruptcy, as it has provided for the dissolution by other means, that provision would be good? I will not say that it would not; but I have heard nothing to convince me that it would." Therefore, his opinion seems to have been that, even if the provision had been in the original deed, it would not have been good. He goes on to say: "From the original deed, it is clear that the intention of the parties was not, as the defendants insist, to apply the special provision to the event of dissolution by bankruptcy. After providing for other cases, it expressly declares, that in case of bankruptcy, the concerns are to be wound up in the same way as if no special provision was made. On this agreement, the parties proceed, till the execution of another deed, which, in one

(1) 1 Swans. 481.

STIRLING, J. 1893 COLLINS v. BARKER.

sense, may be justly said to be made in contemplation of bankruptcy, because it is applicable to the event of bankruptcy alone; but I have no doubt, from the face of it, that it was made, in a strict sense, in contemplation of bankruptcy." So Lord *Eldon*, in that case, looking at the circumstances, came to the conclusion as a matter of fact that the deed was not made *bonâ fide*, but to protect the continuing partners in the event of one of the partners becoming bankrupt; and he held that the provision was not binding upon the assignees of the bankrupt partner. How, in the present case, the clause got into the articles is not clear. Some of the family must have known the circumstances existing at the time of the preparation of the articles; perhaps not *George Barker* himself, who was an old man, and had retired from active business; but some one must have known them, and the clause could not have got into the deed without there being some knowledge of the circumstances. In the absence of any explanation I draw the inference of fact that the clause was inserted in contemplation of bankruptcy. In my opinion, it has been sufficiently made out that there is a case to be tried, and having regard to the large interests of the Plaintiffs, they must be protected. I must treat the case for the present purpose as if the clause had been struck out, and no express provision for winding up the affairs of the partnership had been made. In an ordinary case a solvent partner would be entitled to wind up the partnership affairs, and the usual course where disputes as to the management of the partnership affairs arise between the trustee of a bankrupt partner and the solvent partners, and there is no reason for distrusting the latter, is, as stated in *Lindley* on Partnership (1), that the Court will appoint one of them receiver of the partnership property, directing him to give security, to pass his accounts, and to furnish the trustee with proper accounts, and to allow him at all reasonable times to inspect the partnership books. The Defendant claims the benefit of his *primâ facie* right to be appointed receiver in accordance with the practice of the Court. The Plaintiffs do not object to his being manager, but wish that some one should be appointed receiver jointly with him, and

(1) 5th Ed. p. 670.

that is the question which I have to determine. I feel strongly that the Plaintiffs' risk is so great that they ought to be protected; but the Defendant is a partner, and a solvent one in the sense that he has not been adjudicated bankrupt, though it may be doubtful whether his pecuniary resources are great, and no reason has been shewn why he should not be appointed receiver and manager in accordance with the practice of the Court. He must give security, pass his accounts, he must furnish the Plaintiffs with proper accounts, and allow them all reasonable access to the books; and, further, when the balances in his hands reach a certain amount, to be agreed upon by the parties, he must pay the amount into Court, or to a joint account at a bank of the Plaintiffs and himself. His remuneration must be settled by the Chief Clerk at Chambers. I do not think it desirable to appoint the Defendant manager and some one else receiver, as that course sometimes leads to difficulties.

Solicitors: *A. J. Benjamin; Whittington, Son, & Barker.*

G. A. S.

KEKEWICH, J.

1892

Dec. 3, 10.

In re HENGLER.
FROWDE *v.* HENGLER.

[1889 H. 2796.]

Will—Residuary Gift—Trust for Conversion—Tenant for Life and Remainderman—Property retained and managed at a Loss—Apportionment of Annual Losses or Profits between Capital and Income—Form of Order.

A testator directed that the residue of his estate should be converted on a given day, or as soon after as conveniently might be, and that a share should be held upon trust for one for life with remainders over. When the day arrived, it appeared that a leasehold property forming part of the residue could not be advantageously sold, and that it would be for the benefit of all persons interested that it should be retained by the trustees of the will and managed by them, although at a probable annual loss :—

Held, that the annual loss or profit (if any) ought to be apportioned between capital and income by calculating the sum which, put out at interest at 4 per cent. per annum on the given day and accumulating at compound interest at the like rate with yearly rests, would, together with such interest and accumulations, after deducting income tax, be equivalent at the end of each year to the amount of the loss or profit sustained or made during that year, and then charging the sum so ascertained against, or crediting it to, capital, and charging the rest of the loss against, or crediting the rest of the profit to, income.

Form of order applying the principle of *In re Earl of Chesterfield's Trusts* (1) and *Beavan* v. *Beavan* (2) to such a case.

Adjourned Summons.

Frederick Charles Hengler, circus proprietor, by his will dated the 29th of April, 1882, appointed the Plaintiffs and his wife, the Defendant *Mary A. F. Hengler*, executors and trustees thereof, and directed that two of his sons should have the use and occupation of his circus buildings at *Liverpool*, *Glasgow*, *Kingston-upon-Hull* and *Dublin* until the 1st of March, 1892, at specified rents. On the 1st of March, 1892, or if the sons should cease to carry on business as circus proprietors in partnership before that date, then when they should so cease, the trustees were to have the circuses valued, and to offer them to the two sons at the valuation, and any circus not purchased by the sons was directed to be sold under the power of sale thereinafter

(1) 24 Ch. D. 643. (2) 24 Ch. D. 649, n.

contained. The testator then expressed his wish that no part of his real or personal estate thereinafter devised should be sold until after the 1st of March, 1892; but that expression of his wish was not to fetter his trustees in the exercise of the discretion thereinafter given to them as to the time of sale. He then gave the residue of his estate to his trustees upon trust that they should "as soon as conveniently may be after the said 1st day of March, 1892, or (subject to the directions hereinbefore contained as to my said business) before that date if they, she, or he shall in their, her, or his discretion deem it necessary or advantageous to my estate so to do," sell the same. Out of the proceeds of sale the trustees were to pay debts and legacies, and invest the residue of the moneys, and to stand possessed of the residuary trust moneys and the investments for the time being representing the same upon trust during the widowhood of the Defendant, *Mary A. F. Hengler*, to pay to her the income of a fourth, and to pay the income of the remaining three-fourths to the testator's three sons and five daughters, and subject thereto in trust for the sons and daughters in equal shares. The testator also directed that the rents payable by his sons for the said circuses should be applied as if they had formed part of the residuary trust funds. The will contained no express power to the trustees to postpone conversion after the 1st of March, 1892.

The will was proved on the 16th of December, 1887, by the Plaintiffs and the Defendant, the widow.

The testator was the lessee of a circus in *London* for a term of years, of which about twenty-five years was unexpired, at a ground rent of £1300 a year. This circus was not specifically mentioned in the will, and therefore passed as residue.

On the 19th of March, 1890, an originating summons was issued in the *Liverpool* District Registry against the widow and the other beneficiaries, asking the Court to determine (*inter alia*) whether the rent of the testator's leasehold circus in *London* ought to be paid out of capital or income, and how the same ought to be borne.

By the order made upon the summons on the 22nd of March 1890, it was declared that the rent of the testator's leasehold circus in *London* ought to be paid out of the income of the

KEKEWICH, J.

1892

In re HENGLER. FROWDE *v.* HENGLER.

testator's residuary estate and borne by the beneficiaries in the proportions in which they were entitled to the income.

The trustees were unable to sell the *London* circus and had been obliged to retain it. The rent and outgoings were very large and had greatly exceeded the income, and it was considered to be probable that if the circus were carried on by the trustees a considerable annual loss would be incurred. It was, however, clear that an advantageous sale was not now possible, and that it would be for the benefit of all the persons interested under the will that the sale should be postponed for the present, and that the property should be managed as a going concern under the superintendence of the trustees.

The widow contended that the loss since the 1st of March, 1892, ought not to be borne by the income; but that that loss, as well as the losses to be sustained in the future, ought to be apportioned between income and capital so that a due proportion should be thrown upon capital, and the matter was upon her application now brought before the Court to determine (*inter alia*) the mode in which the apportionment (if any) was to be made. On behalf of the other beneficiaries it was contended that the question was concluded by the order of the 22nd of March, 1890; but Mr. Justice *Kekewich* decided that that order related only to the income accruing before the 1st of March, 1892, and that the question of apportionment was therefore open for decision.

Warmington, Q.C., and *Theobald*, for the widow, referred to *In re Foster* (1), *In re Earl of Chesterfield's Trusts* (2), *Beavan* v. *Beavan* (3), *In re Hobson* (4), and *In re Flower* (5), and submitted that the principle of those cases applied to losses as well as to profits, and that the annual loss or profit ought therefore to be apportioned between capital and income by calculating for each year the sum of money which, if invested on the 1st of March, 1892, the day named by the testator for the conversion of his residuary estate, at 4 per cent. interest and accumulating at compound interest at that rate, with yearly rests and deducting

(1) 45 Ch. D. 629.
(2) 24 Ch. D. 643.
(3) Ibid. 649, n.
(4) 55 L. J. (Ch.) 422; 53 L. T. (N.S.) 627; 34 W. R. 70.
(5) 62 L. T. (N.S.) 216; reversed on appeal on other grounds, 63 L. T. (N.S.) 201.

income tax, would with the accumulations amount at the end of each year to the loss or profit sustained or made during that year, and treating that sum as capital and the rest of the loss or profit as income.

Renshaw, Q.C., and *T. R. Hughes*, for the beneficiaries, and *P. O. Lawrence*, for the trustees, assented to this mode of apportionment, if in the opinion of the Court there ought to be any apportionment in favour of the tenant for life.

KEKEWICH, J., said that in his opinion there ought to be an apportionment upon the basis suggested, and that he would himself settle the form of order for carrying it into effect.

The form of order as subsequently settled by his Lordship was as follows:—

It appearing that an advantageous sale of the testator's circus buildings in *London* has not hitherto, since the 1st day of March, 1892, been possible, and that an advantageous sale thereof may not be effected for a considerable period of time, This Court doth declare that as from the 1st March, 1892, the profit made or loss sustained in respect of such circus buildings in each year until the sale thereof ought to be apportioned between the capital and the income of the testator's estate in manner hereinafter directed. And it is ordered that for the purpose of such apportionment the following inquiries be made after the last day of February, 1893, and the last day of February in each succeeding year until such sale or further order; that is to say: 1. An inquiry what was the amount of profit or loss in respect of such circus buildings during the year ending on such last day of February; 2. An inquiry what sum put out at interest at 4 per centum per annum on the 1st March, 1892, and, as regards such succeeding years, accumulating at compound interest calculated at the like rate with yearly rests, would, together with such interest and accumulations, after deducting income tax, have been equivalent on such last day of February to the amount of such profit or loss; And this Court doth declare that the sum ascertained by the last foregoing inquiry ought to be credited to or charged against the capital of the testator's estate, and that the rest of such profit or loss ought to be credited to or charged against the income thereof.

Solicitors: *Collins, Robinson, Collins, & Driffield, Liverpool; Teebay & Lynch, Liverpool; Toulmin, Lawrence, & Shield, Liverpool.*

C. C. M. D.

ROMER, J.
1892
Nov. 18.

In re GURNEY.
MASON *v.* MERCER.

[1890 G. 1634.]

Trustee—Breach of Trust—Statute of Limitations—Receipt and Conversion of Trust Money to Use of Trustee—Trustee Act, 1888 (51 & 52 *Vict. c.* 59), *s.* 8.

The exception in sect. 8, sub-sect. 1, of the *Trustee Act*, 1888, which prevents a trustee relying on the *Statute of Limitations* as a defence to an action to recover the proceeds of trust property "received by the trustee and converted to his use," does not, in the absence of fraud, apply where trust funds advanced on mortgage are, with the concurrence of the mortgagor, applied in payment of a debt previously charged on the mortgaged property in favour of a bank in which the trustee is a partner.

JOHN GURNEY died on the 4th of December, 1865, having by his will (dated the 27th of May, 1864) appointed *Henry Mason* and *Richard Mercer* executors thereof, and given to them all his residuary personal estate, upon trust for sale and conversion, and to invest the clear surplus thereof (after payment of debts, funeral and testamentary expenses, and legacies) in the Parliamentary stocks and public funds of *Great Britain*, "or on Government or real securities in *England* or *Wales*." The testator also directed *Mason* and *Mercer* to sell his residuary real estate, and out of the proceeds of the residue of his real and personal estate to appropriate and set apart (*inter alia*) two sums of £3750 each, and stand possessed thereof, and of two-elevenths of his ultimate residue, in trust to pay the income to *Mary Ann Mason* and *Helen Roberts* for their respective lives.

The will was duly proved by *Mason* and *Mercer*, and, as representing the two sums of £3750 and the two-elevenths of ultimate residue, they set apart and appropriated certain securities, including certain New £3 per cent. Annuities, some *Victoria* Government Bonds, and some *Great Indian Peninsula Railway* Stock. In the early part of 1878 they sold the bonds and railway stock and a part of the annuities for £10,000, which they invested on a first mortgage, dated the 21st of March, 1878, given to them by *E. J. Goodwin*, on certain freehold lands and buildings,

including farm buildings and hop and fruit gardens in *Kent*. The property had been valued by a valuer, alleged to have been employed by the mortgagor, at £12,750, and no independent valuer was employed by the trustees.

At the date of the advance *Mercer* was a partner in a banking firm carrying on business as the *Kentish Bank*, and *Goodwin* was a customer of the banking firm and indebted to them in a sum exceeding £14,000, which was in part secured by an equitable charge by deposit of the deeds relating to the property mortgaged to *Mason* and *Mercer*. The sum of £10,000 advanced by them was paid to the account of *Goodwin* with the bank, and so in reduction of *Goodwin's* debt to it.

On the 20th of August, 1890, *Mary Ann Mason* brought an action against *Mercer* and *Mason*, and in her pleadings she alleged that the facts as to the indebtedness of *Goodwin* to the bank and the application of the £10,000 were not known to her till shortly before the writ in the action was issued. She also alleged that there had been an improper variation of investments; and claimed a declaration that the investment of the £10,000 on the mortgage was an improper investment and a breach of trust, and that such breach of trust was on the part of *Mercer* fraudulent, and that the Defendants were liable to make good to the trust estate the loss thereby occasioned, *Mercer* being primarily liable. She claimed also consequential relief.

Amongst other defences, the Defendants, by their statements of defence, claimed the benefit of the provisions of the *Trustee Act*, 1888, and of all such statutory enactments for the limitation of actions and suits as might be applicable to the case.

Mason died before the hearing, and the action was revived against his legal personal representative.

Chadwyck Healey, Q.C., and *Lemon*, for the Plaintiff:—

The mortgage was of a speculative character, not of property which was of the proper value for a trustee's investment. There was, moreover, no valuer appointed on behalf of the mortgagees. There was, therefore, a clear breach of trust. The Defendants, however, say the claim is barred by sect. 8 of the *Trustee Act*, 1888. This may be so as to *Mason* and his estate; but *Mercer*

ROMER, J. 1892 *In re* GURNEY. MASON *v.* MERCER.

has no defence. The money actually went into his pocket as one of the partners in the bank, and he is therefore within the exception in sub-sect. 1 of sect. 8 of the Act, which prevents a trustee setting up the *Statute of Limitations* where the action is "to recover trust property, or the proceeds thereof still retained by the trustee, or previously received by the trustee and converted to his use."

[ROMER, J.:—If the money had been handed to the mortgagor, and then paid to the bank, the Plaintiff would have been out of Court.]

Mercer had the deeds, and wanted to reduce the amount of *Goodwin's* account; and he shut his eyes to the fact that the advance was made out of the trust account in contravention of his duty as a trustee. He can shew no discharge for the money, but only a mortgage of less value than the investments realized to raise the money—which benefited himself. Although there is no fraud in the ordinary sense, there is conversion within the meaning of the section.

Neville, Q.C., and *Ingle Joyce*, for the Defendant *Mercer*:—

Money received by the trustee and "converted to his use" must mean money which the trustee could be called on to refund to the trust estate. In that case the beneficiaries would hold the mortgage for £10,000, and have the right to call on the trustee to repay the sum paid to *Goodwin*, which would be absurd.

Horton Smith, Q.C., and *Ingpen*, for the Defendant *Mason's* legal personal representative:—

Mason's case is clearly within the section. There is no suggestion that he received any part of the trust money.

ROMER, J.:—

The short question I have to decide arises in this way: In 1878 trustees, having trust money in their possession, invested it on a mortgage of freehold property. The mortgagor had previously given a charge upon the property to a bank for a debt due by him to them. One of the trustees was a partner in the bank, and the money advanced on mortgage by the trustees was,

by the direction of the mortgagor, paid to the bank in discharge of the bank's debt and of the bank's charge. The case made by the beneficiary against the trustees is that an insufficient security was taken for the trust money. The security taken was within the authority of the trustees; the only complaint is that the property was not of sufficiently high value. It is admitted that the trustee, who was also a partner in the bank, in this matter was not guilty of any fraud or fraudulent conduct. The only act complained of is that of negligence on the part of the trustees in not seeing that the security was ample. Under those circumstances, the action having been commenced in 1890, to the claim by the beneficiary to make the trustees liable for the improper investment in 1878, sect. 8 of the *Trustee Act*, 1888, is pleaded, and I have to determine whether that section applies. Now, it applies to every "action or other proceeding against a trustee or any person claiming through him" except in certain specified instances. The section, therefore, does apply to this action unless the Plaintiff shews that her claim is one of the excepted claims. I turn to the exceptions to see whether this particular claim by the Plaintiff is or is not excepted. It appears to me that it is not excepted. It is not a claim "founded upon any fraud or fraudulent breach of trust." It is not "to recover trust property, or the proceeds thereof still retained by the trustee," nor is it, in my judgment, to recover trust property, or the proceeds of trust property, "previously received by the trustee and converted to his use." In my judgment, it would be a perversion of the language used in that section if I were to hold that such a transaction as this, being an honest transaction, was to be treated as a conversion to his use by the trustee, who happened to be a partner in the bank, of the money lent on mortgage. In my judgment, it is not a conversion to his use at all within the meaning of the section. I therefore hold that the section applies; and it follows that the action must be dismissed.

Solicitors for Plaintiff: *Campbell, Reeves, & Hooper.*

Solicitors for Defendant *Mercer: Hollams, Sons, Coward, & Hawksley.*

Solicitor for Defendant *Mason*: *H. W. Davie.*

ROMER, J.

1892

Dec. 6, 7, 8.

CROSSLEY *v.* MAGNIAC.

[1891 C. 4453.]

Power of Attorney—Sale and Transfer of Stock—Liability of London Stockbroker to Country Customer—Payment in Account to Country Stockbroker—Principal and Agent—Foreign Principal.

C., living in *Canada*, sent through *X.*, a country stockbroker in *England*, a power of attorney for sale of "£1000 *Goschens* standing in the name of *C.*" to the Defendants, who were the London agents of *X.*, with instructions to sell. The Defendants sold the stock for £970, with which (less commission) they credited *X.* in his general account with them. The account between *X.* and the Defendants was ultimately balanced by subsequent entries, including two bills drawn by *X.* and accepted and paid by the Defendants, but no payment expressly on account of the sale of Consols.

The fact of the sale of the stock was not discovered by *C.* for several months, when *X.* was insolvent; and no part of the proceeds of sale was received by *C.*:—

Held, that the Defendants were not relieved either by the transactions between them and *X.*, or by the fact that *C.* was a foreign principal, from liability; and judgment given for the proceeds of the stock with interest at 4 per cent.

Bridges v. *Garrett* (1) distinguished.

HORATIO NELSON CROSSLEY, residing in *Canada*, was in June, 1890, the owner of £1000 New Consols, standing in his name in the books of the *Bank of England*.

In that month, *H. N. Crossley* instructed his brother, *J. W. Crossley* (residing at *Halifax, Yorkshire*), to take the necessary steps for selling such New Consols and other stock of the Plaintiff.

J. W. Crossley held a general power of attorney from his brother, and on the 12th and 13th of June, 1890, he consulted *John Caw*, junr., a stock and share broker in *Halifax*, with reference to the sale of the stock.

Caw advised that the power of attorney was insufficient, and that the *Bank of England* would only act on the special form of power of attorney issued and ordinarily used by them.

Acting on instructions from *J. W. Crossley*, *Caw* on the 13th of June, 1890, wrote to *Gilbey & Sumner*, a firm of stockbrokers,

(1) Law Rep. 5 C. P. 451.

who were his *London* agents, as follows: "Please apply for power of attorney for sale of £1000 *Goschens*, standing in name of *Horatio Nelson Crossley*, of *Brian Royd, Greetland*, near *Halifax*, gentleman . . . . In case the Bank have not had notice of his change of address, Mr. *Crossley's* present address is *Sandy Bay Farm, Lake Rosseau, Muskoka*, in the State of *Ontario*, in the Dominion of *Canada*."

Gilbey & Sumner replied to *Caw* on the 14th of June, 1890, acknowledging receipt of the instructions, and on the 16th of June, 1890, wrote to him as follows:—

"We have to-day applied to the *Bank of England* for powers of attorney for the sale of £1000 *Goschens* . . . . now standing in the name of *Horatio Nelson Crossley*, Esq., and the same will be ready to-morrow."

On the 17th of June, 1890, *Gilbey & Sumner* wrote to *Caw* as follows:—

"We have to-day obtained two powers of attorney from the *Bank of England* for our Mr. *Gilbey* to act as Mr. *Crossley's* attorney for the purpose of selling £2000 of his stock. We have now much pleasure in enclosing these for you to have them signed by Mr. *Crossley*, and we trust same will be found in order."

One of the powers related to a sum of £1000 stock not the subject of the action mentioned below.

By the power of attorney relating to the £1000 New Consols, *H. N. Crossley* appointed "*Southard Gilbey*, of, &c., my attorney in my name and on my behalf to sell and transfer all or any part of the sum of one thousand pounds £2 15*s.* per cent. Consolidated Stock standing in my name in the books of the Governor and Company of the *Bank of England*, and to receive the consideration money and give receipts for the same. And also to do whatever is necessary or proper to be done for the purpose aforesaid."

Southard Gilbey was a member of the *London* firm of stock-brokers.

Caw handed the powers to *J. W. Crossley*, who sent them to *H. N. Crossley*, by whom they were returned duly executed.

ROMER, J.
1892
CROSSLEY v. MAGNIAC.

J. W. Crossley retained the powers of attorney till December, 1890, when the stock not the subject of the action was sold by *Gilbey & Sumner*, the purchase-money being paid by *Caw* to *J. W. Crossley*.

On the 30th of December, 1890, the *London* stockbrokers (now *C. H. Magniac, Gilbey, & Sumner*) wrote to *Caw* complaining of the state of his account with them, and asking for security for the balance owing to them thereon.

In January, 1891, *Caw* told *J. W. Crossley* that New Consols had risen to 97½, and that if he would hand him the power of attorney relating thereto *Caw* would forward it to his agents who would arrange for the sale of them. *J. W. Crossley* accordingly handed the power to *Caw*, who sent it to *C. H. Magniac, Gilbey, & Sumner* on the 23rd of January, 1891, in the following letter:—

"I enclose P. A."—power of attorney—"for sale of £1000 *Goschens*, which please sell at best for cash."

The Consols were sold on the 27th of January, 1891, for £970. The transaction was shortly afterwards completed, and *Caw* was informed of what had been done.

On the 26th of January, 1891, on the account of *Caw* with *C. H. Magniac, Gilbey, & Sumner*, there was a balance due from the former of £596 16*s.* 4*d.*

After crediting *Caw* with £970, the price of the New Consols, and debiting him with 12*s.* 6*d.*, the commission for selling the same, there was a balance in favour of *Caw* of £372 11*s.* 2*d.*

Various items then appeared on both sides of the account in respect of stock transactions, and (dated January 31, 1891) on the debit side of the account, an item of "Cheque £125." This was really the amount of a bill of exchange for £125 drawn by *Caw* on the *London* brokers. This bill was paid by *Caw* into his own bank for collection, and presented by the *London* agents of the bank, for payment, to the *London* brokers, and paid by them.

After payment of this bill the balance in favour of *Caw* was £403 15*s.* 3*d.*

The results of various other transactions in stocks and shares were then entered on both sides of the account, and (February 3, 1891), an item, "Cheque £403 15*s.* 2*d.*," was debited against *Caw*.

This was really the amount of another bill drawn by *Caw* on the *London* brokers, negotiated by him and paid by them at his request. The ultimate balance of the account in favour of *Caw* (£601 16*s.* 3*d.*) was also paid away as *Caw's* cheque or draft.

J. W. Crossley made several inquiries of *Caw* with respect to the Consols, but was told they had not been sold, as the *London* brokers had not been able to obtain 97½ for it.

On the 6th of July, 1891, *Caw* was adjudicated bankrupt, and in the bankruptcy proceedings *J. W. Crossley* ascertained that the New Consols had been sold in January, 1891.

No part of the purchase-money was ever received by *J. W. Crossley* or *H. N. Crossley.*

In December, 1891, *H. N. Crossley* commenced an action against *C. H. Magniac, Gilbey, & Sumner* for £967 10*s.*, the price of the Consols less £2 10*s.*, the full commission, and for interest; and the action was tried before Mr. Justice *Romer* on the 6th, 7th, and 8th of December, 1892.

The evidence did not establish any custom or usage that *London* brokers could discharge themselves, as against the client of a country broker, by payment in account with the country broker.

Neville, Q.C., and *T. Bateman Napier*, for the Plaintiff:—

Caw's only instructions were to obtain a power of attorney. The Defendants had full knowledge that the Plaintiff was the owner of the stock, and obtained a power of attorney to a member of their firm "to sell and transfer" the stock of the Plaintiff. Under these circumstances, they cannot disregard the Plaintiff, because they communicated with him through *Caw.* Having received the Plaintiff's purchase-money, the Defendants applied it in payment of *Caw's* debt. But having had notice that the stock was not the property of *Caw*, and assuming that *Caw* had authority to receive the money for the Plaintiff, giving *Caw* credit in the account, without paying in cash, did not discharge the Defendants from liability to the Plaintiff: *Pearson* v. *Scott* (1); *Sweeting* v. *Pearce* (2). The Defendants apparently

(1) 9 Ch. D. 198. (2) 9 C. B. (N.S.) 534.

ROMER, J. 1892 CROSSLEY v. MAGNIAC.

rely on a decision of Mr. Justice *Day* in *Blackburn* v. *Mason* (1). But that decision turned on facts which were different from those of the present case.

Haldane, Q.C., and *Kirby*, for the Defendants:—

The power of attorney did not create the relation of principal and agent. *Caw* was instructed to sell, and said a power of attorney was necessary, as it is in nearly all cases of sale of stock. Acting on instructions from *Caw*, a power of attorney was obtained by the Defendants, who sent it to *Caw*, and it came back to the Defendants, through *Caw*, in the ordinary course of business. All the instructions were from *Caw*, and the power of attorney was a mere document of title, to be read subject to such instructions. It was a mere incident to the transaction between *Caw* and the Defendants, and no more affects the liability of the latter than it would have done if it had been given to a man in the street. It is the invariable practice for the *London* brokers to transmit the proceeds of stock to the country broker, and debit the latter with the amount in the general account between them; and the mode of dealing here was in accordance with the ordinary practice. It is said the amount ought to have been paid in cash. But if payment is by cheque, and the cheque is duly honoured, that is payment of cash, and it is immaterial that the cheque includes not only the amount due to the principal of the agent receiving the money, but other moneys payable to such agent in any other capacity: *Bridges* v. *Garrett* (2).

There was no privity between the Plaintiff and the Defendants, and the Defendants were, therefore, discharged by the payments to *Caw*, who was their principal: *New Zealand and Australian Land Company* v. *Watson* (3). But if the Defendants are not entitled to succeed as to the whole amount paid to *Caw*, they are discharged to the extent of £125, which was paid to his bankers, and, in effect, in the same way as if the Defendants had given him a crossed cheque. Moreover, the Plaintiff, if a principal, was a foreign principal, and therefore the Defendants were entitled to treat *Caw*, the agent in *England*, as their principal,

(1) Reported in the *Times*, May 18, 1892.

(2) Law Rep. 5 C. P. 451, 454.

(3) 7 Q. B. D. 374.

and disregard the Plaintiff: *Elbinger Actien-Gesellschaft* v. *Claye* (1); *Montgomerie* v. *United Kingdom Mutual Steamship Association* (2).

ROMER, J.:—

The Plaintiff, being the owner of a sum of New Consols standing in his name, gives a power of attorney to a member of the Defendants' firm, authorizing him to sell and transfer the stock for the Plaintiff, and on the Plaintiff's behalf. By virtue of this power the stock is sold by the Defendants and transferred to the purchaser, and the purchase-money is received by them. The Defendants are paid for their services as brokers out of the Plaintiff's money, the proceeds of the sale. What was thereupon the duty of the Defendants with regard to such proceeds? It was to pay the amount, less their commission, to the Plaintiff, or to some person authorized by him to receive it. And if the Defendants paid to any such authorized person, and if with that person they had other private dealings, they were bound, as between themselves and the Plaintiff, to pay that authorized person in cash, and not in account between them. Of course, payment by cheque, duly cashed, is payment in cash for this purpose.

Now, what difference did it make that, in the case before me, the Defendants, being instructed to act for the Plaintiff, obtained the power of attorney from him through the intervention of a country broker? I think it makes no difference, seeing that the Defendants clearly knew that the stock was the Plaintiff's, and sold it for him and under his power of attorney in the way I have mentioned. The Defendants cannot, in my opinion, ignore the power of attorney and the wording of it in the way in which, through their counsel, they now seek to do. Nor, in my opinion, did the fact that the Plaintiff was abroad entitle the Defendants to regard the country broker as their principal in the matter, and to ignore the Plaintiff. There was clearly privity between the Plaintiff and the Defendants in the matter of this sale. The authorities cited by the Defendants' counsel with reference to a

(1) Law Rep. 8 Q. B. 313. (2) [1891] 1 Q. B. 370.

ROMER, J. 1892 CROSSLEY v. MAGNIAC.

oreign principal have no bearing, in my opinion, on the present case, where the Defendants act under an authority given on the face of it direct to them from the Plaintiff.

What have the Defendants done with the proceeds of the sale? Admittedly, they have not paid them to the Plaintiff. Have they paid them, in cash, to a person authorized to receive the proceeds for the Plaintiff? I assume, in favour of the Defendants, that the country broker was authorized, on behalf of the Plaintiff, to receive the proceeds of the sale. But the Defendants did not pay the proceeds to the country broker for the Plaintiff. What they did was this—they chose to treat the purchase-money of the stock as the country broker's own, and to ignore the Plaintiff in the matter. It is said that this was justified by some custom or usage. The evidence does not establish, to my satisfaction, any such custom or usage. Moreover, I do not think any such custom or usage would be held valid by this Court which purported to justify an agent, having his principal's money in his hand, in ignoring that principal, and applying the moneys in payment of money due to himself from a third person. The Defendants, in my judgment, were not justified in ignoring the Plaintiff in the matter, or in treating the proceeds of sale as the country broker's own money. What the Defendants did with the proceeds was this—they carried them to the credit of the country broker in the account between themselves and that country broker. This wiped off a debt of £596 16*s.* 4*d.*, due from the country broker to them, leaving a balance in favour of the country broker of £372 11*s.* 2*d.* They did not pay even this £372 11*s.* 2*d.* to the country broker for the Plaintiff, still less did they pay it to the country broker for his principal, the Plaintiff, in cash. They carried that balance of £372 11*s.* 2*d.* to the credit of the country broker in the further accounts between the broker and themselves. A further balance is, later on, struck as between the country broker and the Defendants in the account between them, and the balance of £372 11*s.* 2*d.* is increased to a balance in favour of the country broker of £403 15*s.* 3*d.* This £403 15*s.* 3*d.* the Defendants did not pay to the country broker for the Plaintiff, but they let the country broker draw on them a bill for it, as being a balance due to the country broker from them on his

private account between them. The whole of that bill they paid at maturity to a third person, not the Plaintiff. This cannot, in my opinion, be treated by the Court as a discharge to the Defendants as between themselves and the Plaintiff.

The same observations apply with regard to a sum of £125 which appears to have been paid to the country broker by the Defendants on the 31st of January, 1891.

The country broker appears to have drawn a bill on the Defendants for £125 as a sum on account of the general account between them. The bill was accepted by the Defendants and paid by them and allowed in account as between themselves and the country broker. It was not a payment by the Defendants to the country broker in respect of this particular purchase-money belonging to the Plaintiff. In my judgment it was not such a payment in cash as enables the Defendants to say that they had discharged their duty to the Plaintiff by paying part of the proceeds of his stock in cash to an agent authorized by him to receive it.

The case of *Bridges* v. *Garrett* (1), to which I was referred by the Defendants' counsel, is clearly distinguishable. There the payment was made to a person entitled to receive, clearly in respect of the moneys which the person to whom it was paid was entitled to receive on account of his principal, and in respect of the amount which he was so entitled to receive. The only question which arose there was because the payment included other moneys, and was made by a crossed cheque; but it was held that the payment was not the less one in cash, duly authorized, merely because it included other moneys or because it was paid by a crossed cheque which was duly cashed. That case is no authority in favour of the Defendants in the case before me.

The case before Mr. Justice *Day*, to which I was referred (and which does not appear to have been reported), clearly turned on the special findings of fact of the learned Judge in that case, and I need not further refer to it. It is not an authority in the present case in favour of the Defendants.

It follows that in my judgment the Plaintiff has succeeded,

(1) Law Rep. 5 C. P. 451.

ROMER, J. 1892 CROSSLEY v. MAGNIAC.

and there must be an order for payment by the Defendants to the Plaintiff of £967 10*s.*, the amount of the proceeds of sale less commission, with interest at 4 per cent. to the day of payment from the 28th of January, 1891.

Solicitors: *Rowcliffes, Rawle & Co.*, agents for *Wavell, Son, & Marshall, Halifax; Slaughter & May.*

F. E.

In re BIDWELL BROTHERS.

VAUGHAN WILLIAMS, J.

1893

Feb. 20.

[0034 of 1893.]

Company—Meeting of Shareholders—Resolution—Special Resolution—Proxies—Poll not demanded—Mode of taking Votes—Voluntary Winding-up—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *ss.* 51, 129; *Sched. I., Table A, Arts.* 42, 43, 48, 51 [*Revised Ed. Statutes, vol. xiv., pp.* 214, 231, 255, 256].

At a meeting of shareholders of a company, the articles of which allow voting by proxy, although no poll is demanded, the chairman, in ascertaining the number of votes given, must count the vote of each person who has appointed a proxy, not according to the number of shares held by him, but as one vote.

In re Caloric Engine and Siren Fog Signals Company (1) not followed.

In re Horbury Bridge Coal, Iron, and Waggon Company (2) distinguished.

A COMPANY called "*Bidwell Brothers, Limited*," was, in Aug. 1889, incorporated under the *Companies Acts*, 1862 to 1886, with a capital of £20,000, divided into 8000 preference shares, and 12,000 ordinary shares, of £1 each respectively.

The articles of association, so far as material to this report, were as follows:—

"1. The regulations contained in the table marked 'A' in the First Schedule to the *Companies Act*, 1862 (hereinafter called Table 'A'), shall, subject as hereinafter provided, apply to this company."

"7. The quorum of a general meeting shall be three members personally present. Every share shall confer one vote.

"8. The words 'or carried by a particular majority, or lost,' shall be inserted in clause 42 of Table 'A,' after the word 'carried,' and the word 'conclusive' shall be substituted for the word 'sufficient' in the same clause.

"9. The words 'and either at once or after an interval or adjournment' shall be inserted in clause 43 of Table 'A' after the word 'manner.'"

(1) 52 L. T. (N.S.) 846.

(2) 11 Ch. D. 109.

VAUGHAN WILLIAMS, J.

1893

In re BIDWELL BROTHERS.

The material provisions of Table A are as follows:—

"42. At any general meeting, unless a poll is demanded by at least five members, a declaration by the chairman that a resolution has been carried, and an entry to that effect in the book of proceedings of the company, shall be sufficient evidence of the fact, without proof of the number or proportion of the votes recorded in favour of or against such resolution.

"43. If a poll is demanded by five or more members it shall be taken in such manner as the chairman directs, and the result of such poll shall be deemed to be the resolution of the company in general meeting. In the case of an equality of votes at any general meeting the chairman shall be entitled to a second or casting vote."

"48. Votes may be given either personally or by proxy."

In pursuance of a notice duly given to the shareholders, an extraordinary general meeting of the company was held on the 27th of January, 1893, for the purpose of considering, and, if thought expedient, passing a resolution "that it has been proved to the satisfaction of the company that it cannot by reason of its liabilities continue its business, and it is therefore advisable to wind up the same."

There were, besides the chairman, twenty-nine members personally present at the meeting, including *James Bidwell* and *Arthur Bidwell*, and these two persons held proxies from thirty-four other shareholders who were not personally present.

After the notice had been read, the chairman put the resolution to the meeting, upon which an amendment was proposed by one shareholder, and seconded by another, that the above resolution should end by placing the word "compulsorily" before the words "wind up the same.'

This amendment was put to the meeting by the chairman, upon which thirteen members personally present voted in favour of the amendment, and sixteen members personally present including the holders of the thirty-four proxies voted against it.

The chairman treated the amendment as lost, and put to the meeting the original resolution, which, together with a resolution appointing a liquidator, was supported by the votes of the sixteen

members and thirty-four proxies who had voted against the amendment, against the votes of the thirteen members who had voted for the amendment.

The chairman declared the resolutions for voluntary winding-up, and the appointment of a liquidator, to be carried, and no poll was demanded.

A minute to the above effect was duly entered and signed by the chairman.

On the 3rd of February, 1893, a petition was presented to the High Court of Justice by fifteen shareholders, holding together 1235 fully paid-up preference shares in the company.

The petition stated that the resolutions, if duly carried at all, which the Petitioners did not admit, were carried, against a considerable minority, by votes given in respect of shares held or controlled by the vendors to the company; that none of the Petitioners had voted for the resolution; that if the assets of the company were properly realized, there would be a substantial surplus to return to the shareholders; and that, having regard to alleged mismanagement and irregularities in the conduct of the business, and to circumstances attending the formation of the company, the interests of the shareholders were not adequately protected by a voluntary liquidation. The Petitioners accordingly asked for a compulsory winding-up order, or, alternatively, that the voluntary winding-up might be continued under the supervision of the Court.

C. E. E. Jenkins, for the Petitioners:—

The resolution in favour of voluntary winding-up having been carried only with the aid of the proxies, although no poll was demanded, is invalid. In such a case the voting is by show of hands, and not by counting shares or proxies, and the majority is a numerical one, without regard to the number of shares held by the members voting: *In re Horbury Bridge Coal, Iron, and Waggon Company* (1).

The votes of the proxies could only have been properly counted if a poll had been demanded.

Sects. 51 and 129 of the *Companies Act,* 1862, require a three-

(1) 11 Ch. D. 109.

VAUGHAN WILLIAMS J.

1893

In re BIDWELL BROTHERS.

fourths majority in favour of the resolution; and as no such majority, irrespective of the proxies, was obtained, the resolution in favour of voluntary liquidation was not duly passed.

R. M. Pattisson, for shareholders, and *Clydesdale*, for creditors, supported the petition.

Bramwell Davis, for another creditor, did not oppose it.

Hansell, for the voluntary liquidator and a large number of shareholders:—

Art. 48 of Table A enables votes to be given "either personally or by proxy." The form of proxy paper prescribed by art. 51 enables the person appointed proxy to vote at the meeting and at "any adjournment thereof." As the poll is generally taken after adjournment, if proxies were only to be used in case of a poll, there would be little good in giving them for use before the adjournment. Nothing in art. 48 restricts the use of proxies to the case of a poll. The intention, as shewn by the articles, was that proxies might be used at any meeting; and the resolution has therefore been passed by the required majority.

[VAUGHAN WILLIAMS, J., referred to *In re Caloric Engine and Siren Fog Signals Company* (1).]

Jenkins, in reply:—

There is no statement in the report of that case shewing what were the articles of association. It may be inferred from the head-note that they allowed voting by proxy; and Mr. Justice *Kay* held that the proxies could not be used on a show of hands, but only when a poll was taken.

[VAUGHAN WILLIAMS, J.:—Apparently, although a proxy can vote, he cannot demand a poll: *Buckley* on Companies (2); *In re Haven Gold Mining Company* (3).]

That case and *Reg.* v. *Government Stock Investment Company* (4) only point out how a poll may be duly demanded—not how the

(1) 52 L. T. (N.S.) 846.
(2) 6th Ed. p. 483.
(3) 20 Ch. D. 151.
(4) 3 Q. B. D. 442.

votes are to be counted if there is no poll. A poll may be taken at once, without an adjournment for the purpose of taking it: *In re Chillington Iron Company* (1).

VAUGHAN WILLIAMS, J.:—

I have come to the conclusion that the votes of the members who were present only by proxy ought to be taken into consideration, even though no poll was demanded. Mr. Registrar *Emden* has called my attention to the decision of Lord Justice (then Mr. Justice) *Kay*, in *In re Caloric Engine and Siren Fog Signals Company* (2). I do not know what the particular articles in that case were, and the question does not seem to have been argued at any great length. Of course, I should pay the greatest attention to a decision of Sir *Edward Kay* as a Judge of the Chancery Division; but I consider that I am not bound by his decision in that case, and that I am at liberty to deal with the matter as I think best. I have also had my attention called to *In re Horbury Bridge Coal, Iron, and Waggon Company* (3).

No one suggested that the point I have now to deal with was decided in that case; it was only said that principles were there laid down by Sir *George Jessel* which are practically decisive as to what I have now to determine. I do not think that that is so. All that is there laid down is, that where there is a meeting of members of a company present in person, the mode of ascertaining the votes of such members is to be the common law mode, *i.e.*, by show of hands. It was not decided that that mode was to be adopted at a meeting where some of the members were present only by proxy. Under the circumstances, I have to decide for the first time what is the proper mode of taking the votes at such a meeting, and I hold that the proper mode is for the chairman to count, not only the votes of the members present in person, but also the votes of those present by proxy. In the case of this particular company Table A applies, and art. 48 of that table says that "votes may be given either personally or by proxy." *Primâ facie*, that means upon all occasions when there has to be voting. Sect. 51 of the

(1) 29 Ch. D. 159. (2) 52 L. T. (N.S.) 846.
(3) 11 Ch. D. 109.

VAUGHAN WILLIAMS, J.

1893

In re BIDWELL BROTHERS

Companies Act, 1862, says that "a resolution passed by a company under this Act shall be deemed to be special whenever a resolution has been passed by a majority of not less than three-fourths of such members of the company for the time being entitled, according to the regulations of the company, to vote as may be present, in person or by proxy (in cases where by the regulations of the company proxies are allowed), at any general meeting of which notice specifying the intention to propose such resolution has been duly given, and such resolution has been confirmed," as therein mentioned. Under sect. 129 of 1862, a resolution for a voluntary winding-up must be a special resolution or an extraordinary resolution, *i.e.*, "a resolution passed in such manner as would, if it had been confirmed by a subsequent meeting, have constituted a special resolution, as hereinbefore defined." In the present case, by the regulations of the company, proxies are allowable, and accordingly a special resolution cannot be passed unless three-fourths of the members present, personally or by proxy, are in favour of it. It seems to me impossible that, under these circumstances, the number of the votes is to be ascertained in such a mode as to exclude the votes of those members who are present by proxy. It is said the votes of those persons can be counted, and will be counted, when a poll is demanded, and that it is intended that their voice shall be heard on that occasion only. It seems to me that a decision to that effect would create great injustice to the members present at a meeting by proxy only, because, according to the decision in *Reg.* v. *Government Stock Investment Company* (1), the proxies do not seem able to demand a poll. I think that, under these circumstances, I ought to hold that the chairman of this company was right in counting the votes of the members who were present by proxy. The votes of those persons must be counted as the votes of persons actually present, not according to the number of shares they hold, but each person present by proxy must vote as one person and one person only, and the chairman must ascertain the way in which he wishes to vote from his proxy.

That decision does not determine the merits of the case.

(1) 3 Q. B. D. 442.

Jenkins:—I am willing that a supervision order should be made.

VAUGHAN WILLIAMS, J.:—

Very well; I make an order that the voluntary liquidation shall be continued under the supervision of the Court.

Solicitors: *Sole, Turner, & Knight*, agents for *E. J. Brutton, Ottery St. Mary; Sandilands & Co.; Coode, Kingdon, & Cotton*, agents for *Gould & Crompton, Exeter; Chester & Co.*

F. E.

WRIGHT, J.

1893

Feb. 2, 3, 16.

POWELL *v.* LONDON AND PROVINCIAL BANK.

[1891 P. 1550.]

Company—Stock—Registration—Legal Title—Blank Transfer—Deposit of Certificate—Purchase for Value without Notice—Constructive Notice—Fraudulent Trustee—Priority—Companies Clauses Consolidation Act, 1845 (8 & 9 *Vict. c.* 16), *ss.* 14, 15, 18, 19, 20 [*Revised Ed. Statutes, vol. ix., pp.* 567, 568].

The holder of a sum of stock of a company regulated by the *Companies Clauses Act*, 1845, deposited with a bank as security for an advance, first, the stock certificate, which shewed that he was entitled as executor; secondly, a loan-note undertaking to execute a proper assignment of the stock when required; thirdly, a blank transfer. This transfer was not stamped, and was expressed to be in consideration of 5*s*. The stock was held by the borrower as sole executor of a sole trustee of a settlement. Before making the advance, the bank manager inquired of the borrower whether he was absolutely entitled, and was informed that he was; he also examined the will, which contained no reference to any trust; he also endeavoured to obtain a new certificate in the name of the borrower, but was correctly informed that such was not the practice of the company where the holder was entitled as executor. The bank subsequently executed the blank transfer, and became registered as the holders of the stock; but the transfer was not re-delivered or re-executed by the borrower, nor was it executed by the bank in his presence, or by his authority under seal:—

Held, that the bank were not fixed with notice of the settlement; but *held*, that the transfer was not the deed of the borrower, and did not pass the legal title to the stock, and that the persons claiming under the settlement were entitled to priority.

Semble, the transfer was invalid also on the ground that it was not stamped, and did not truly state the consideration as required by the *Companies Clauses Act*, 1845.

THE Plaintiffs *H. St. J.* and *H. L. Powell* were the existing trustees of a marriage settlement dated the 28th of August, 1867, and the Plaintiff *Elizabeth Lawrence*, the wife of *Frederick Lawrence*, was entitled thereunder to the income of the trust moneys. The Plaintiffs claimed a sum of £1000 stock of the *Penarth Harbour Dock and Railway Company*, standing in the name of the Defendants, the *London and Provincial Bank*. The company was regulated by the *Companies Clauses Consolidation Act*, 1845.

By the settlement in question certain shares, now represented by the £1000 stock, were vested in *Edmund Butler Edwards* and *Walter Powell* upon the trusts of the settlement. *W. Powell* died in 1881, and from that date until 1885 the shares stood in the company's books in the name of *E. B. Edwards*, the sole surviving trustee, without any entry shewing a trust. In 1884 the shares were converted into stock, and in 1885 the company issued a certificate, which was as follows :—

"*Penarth Harbour Dock and Railway Company* Stock.
"£1000.

"This is to certify that *Edmund Butler Edwards*, of *Pontypool*, Esquire, is the proprietor of One thousand pounds Stock in the *Penarth Harbour Dock and Railway Company*.

"*Cardiff*, June 20th, 1885.

"*G. H. Windsor Clive*, Director.
"*John E. Bacon*, Secretary.

"No. 224, Reg. Folio 185.

"*Note.*—This certificate must be deposited at the Office with the Deed of Transfer, when such transfer is for the whole or any portion thereof, before a new certificate can be issued in exchange.

"No interest in this Stock can be acquired by the deposit of this certificate."

E. B. Edwards died in November, 1884, leaving a will, sworn under £2600, by which, after a specific legacy of £1000 to a daughter, he devised his whole estate to his son *Martin Edwards*, and appointed him executor with another person, who did not prove. The will did not mention the stock, nor refer in any way to the settlement, or to any trust. *Martin Edwards*, on the 16th of December, 1885, sent to the harbour company the probate of the will and the certificate, and the proper entries of the probate and of the name of *Martin Edwards* as the executor were made in the register and indorsed on the certificate by the company, whereupon the legal title became completely vested in him. The indorsement was as follows :—

"*Edmund Butler Edwards*, died 9th November, 1884. Probate of the will exhibited at the office of the *Penarth Harbour*

WRIGHT, J.
1893
POWELL
v.
LONDON AND PROVINCIAL BANK.

Dock and Railway Company, Cardiff, on December 16, 1885. Probate granted to *Martin Edwards*, solicitor, of *Pontypool*.

"*John E. Bacon*, Secretary.

"Reg. Folio 185."

In May, 1886, *Edwards* applied to the bank to be allowed a temporary overdraft on the security of the deposit of the stock certificate. In view of the indorsement the bank inquired from him whether the stock belonged to him, and was told that it did so absolutely. Either then or at some previous time the bank manager had seen the will, and was aware of its contents. He asked *Edwards* to procure and deposit a new certificate in the name of *Edwards*; and in June, 1886, *Edwards* deposited the old certificate with a letter from the harbour company's secretary to the following effect:—

"Referring to the inclosed probate of will of the late Mr. *E. B. Edwards*, I beg to inform you the stock now stands in this company's books in your name solely, and it is not necessary, neither is it the practice of the company, to issue a certificate in your name."

To this was added a postscript, as follows:—

"If you would prefer a new certificate I will, on hearing from you, ask the directors on what conditions they would be willing to issue one."

He also signed and deposited a loan-note in the usual form, undertaking, when called upon, to execute a proper assignment or transfer of the stock. He also deposited a blank transfer, signed and sealed by him, purporting to transfer, in consideration of 5*s*., £1000 stock of the harbour company. This transfer was not dated nor then executed by the bank, nor stamped, nor did it contain the name of the bank or of any person as transferee. Large advances were made by the bank on this security, and as they were not reduced when the period of credit had run out, the bank, after giving notice to *Edwards*, in September, 1887, filled up and executed the blank transfer, and sent it in for registration, and they became registered as the owners of the stock. The blank transfer when filled up was never re-delivered or re-executed by *Edwards*, nor was there any authority under

seal from him to the bank to act upon the blank transfer, nor was it filled in or executed by the bank in his presence.

In 1889, *Edwards* authorized the bank to sell the stock and apply the proceeds in reduction of his debt on certain conditions; but the bank declined to accede to the conditions.

During all this time *Edwards* had prevented inquiry by paying the interest on the stock to the Plaintiff Mrs. *Lawrence* by his own cheques. At length he absconded, and the facts became fully known early in 1891. In May, 1891, the Plaintiffs *H. St. J.* and *H. L. Powell* were appointed trustees of the settlement, and this action was commenced against the bank and *Edwards*, and, on his being adjudicated bankrupt in November, 1891, his trustee in bankruptcy was added as a Defendant.

The Plaintiffs claimed a declaration that the *London and Provincial Bank* held the stock in trust for the Plaintiffs, the trustees of the settlement, and an order upon the bank to transfer the stock to them; also payment of the dividends received by Defendants or either of them in respect of such stock since the date of the transfer to the bank and not already paid to the Plaintiff Mrs. *Lawrence*.

The defence set up by the bank was that they were purchasers for value without notice.

Giffard, Q.C., and *Kenyon Parker*, for the Plaintiffs:—

1. The bank were put upon inquiry as to the title of *Martin Edwards*. The secretary of the dock company said a new certificate would be issued "on conditions"; they ought to have inquired of him what these conditions were; if they had, they would have discovered that the stock was held upon trusts.

2. They did not get in the legal estate at the time they made the advance; the transfer was made afterwards. You cannot get in the legal estate without paying value at the time: *Mumford* v. *Stohwasser* (1); *Sharples* v. *Adams* (2).

3. The transfer was not *Edwards's* deed: *Hibblewhite* v. *M'Morine* (3), and it is not properly stamped, and the consideration is not properly stated.

(1) Law Rep. 18 Eq. 556.
(2) 32 Beav. 213.
(3) 6 M. & W. 200.

WRIGHT, J.

1893

POWELL v. LONDON AND PROVINCIAL BANK.

Murphy, Q.C., and *R. F. Norton*, for the Defendant bank:—

1. The bank made all necessary inquiries. If the testator had brought the certificate no inquiries would have been necessary. As his executor brought it the bank were put on inquiry as to the terms of his will. This they saw, and they were assured by the executor that he was absolutely entitled, and the will shewed no reason to doubt this: *London Joint Stock Bank* v. *Simmons* (1). To make inquiries of the dock company cannot have been necessary, as the company cannot accept notice of trust: *Companies Clauses Consolidation Act*, 1845, s. 18; *Société Générale de Paris* v. *Walker* (2).

2. Assuming that the bank did not give value at the time when they got the legal estate, the legal estate can be got in at any time before notice of the trust: *Taylor* v. *Russell* (3); *Blackwood* v. *London Chartered Bank of Australia* (4); *Harpham* v. *Shacklock* (5); or even after notice of the trust if the transferor is not required to do anything: *Dodds* v. *Hills* (6). The *dictum* of *Jessel*, M.R. in *Mumford* v. *Stohwasser* (7) goes too far, and has never been recognised as law.

3. If necessary the Court will presume a re-delivery of the transfer, *per* Lord Justice *Lindley*, in *Société Générale de Paris* v. *Tramways Union Company* (8), for here *Edwards* recognised the transfer as having been made by him by asking the bank to sell the stock. In any event, the Plaintiffs cannot raise the point that the transfer is void, as they are here asking the bank to transfer, *i.e.*, recognising the validity of the transfer to the bank. If the transfer is void, they must bring an action against the harbour company to reinstate *Edwards* on the register.

Munns, for the trustee in bankruptcy of *Martin Edwards*.

Giffard, in reply.

1893. Feb. 16. WRIGHT, J. (after stating the facts, continued):—

In my opinion there was nothing to put the bank on inquiry beyond that which they made. The only circumstance calling for inquiry at the time of the deposit was the fact that *Edwards's*

(1) [1892] A. C. 201.
(2) 11 App. Cas. 20.
(3) [1892] A. C. 244.
(4) Law Rep. 5 P. C. 92, 111.
(5) 19 Ch. D. 207.
(6) 2 H. & M. 424.
(7) Law Rep. 18 Eq. 556.
(8) 14 Q. B. D. 424, 449.

title on the register and certificate was as executor. They had seen the will, and that contained no indication of a trust. They did inquire why *Edwards* had not taken out registration in his own name, and were informed by the letter of the secretary of the company that the entries as made in the register and certificate were in accordance with the company's practice. They inquired directly of *Edwards* whether he was absolutely entitled, and they were assured by him that he was. It is suggested that they should have obtained his authority to apply to the company for information, and that, in fact, if they had done so they would have become aware of matters which would have put them upon further inquiry. I think there was nothing which required them to go that length at that time. It is not the duty of bankers to suspect fraud or breach of trust when there are no indications of it nor anything unusual in the transaction, documents, or circumstances. When at last the bank sent in the transfer for registration, they were entitled to assume that the harbour company, if that company knew of any trust or incumbrance, would object to make the transfer on that ground.

The law affecting the case is clear in its general outlines. A transferee or incumbrancer taking a merely equitable interest takes in general only what his transferor could equitably give him, as is laid down in the case of the *Shropshire Union Railways and Canal Company* v. *Reg.* (1). In particular cases, however, he may on special grounds be entitled to priority over some previous equitable incumbrancer—as, for example, in cases of *laches* on the part of that incumbrancer. A transferee or incumbrancer taking in the first instance for valuable consideration the whole legal estate takes it free from any equity which bound the transferor, unless in the case of negotiable instruments the transferee knew of or wilfully shut his eyes to that equity, and in other cases unless he knew or shut his eyes or neglected to make inquiries which the facts before him or his agent required him in reason to make. A transferee or incumbrancer for valuable consideration who takes in the first instance a merely equitable interest, without notice of any prior interest, can subsequently perfect his title, even after notice of

(1) Law Rep. 7 H. L. 496.

WRIGHT, J. 1893 POWELL v. LONDON AND PROVINCIAL BANK.

the prior interest, by acquiring the legal estate, subject to the exceptions suggested in *Taylor* v. *Russell* (1), *Mumford* v. *Stohwasser* (2), *Harpham* v. *Shacklock* (3), and other cases, which may perhaps be stated as follows: The transferee must not get in the legal estate from a person whom he knows or ought to know to be a trustee of the estate upon express trusts for a prior incumbrancer. There are some expressions which carry the exception further, and suggest that a satisfied mortgagee is in the position of a trustee for this purpose for his mortgagor, and also that the legal estate cannot be effectually got indirectly from a person who is in fact a trustee on express trusts, even though the transferee has no knowledge of the fact, unless perhaps when value is given to the trustee at the time. These expressions do not, however, appear to have been as yet stated or accepted as established or developed law. On this view of the facts of the case and the law, if the bankers are to be considered as having the legal estate in the stock, they will, in my opinion, be entitled to succeed. They would be in substance purchasers for value without notice or negligence, and not the less so because the transfer was not completed at once by registration. The doctrine suggested by *Jessel*, M.R., in *Mumford* v. *Stohwasser* would not be applicable, because the bankers do not rely on anything done by *Edwards* after the creation of their charge. They did not go to him to get him to give them a priority, which according to that doctrine he could not as trustee have given them unless (if at all) for value given at the time. They simply by their own act, and without notice of anything wrong, completed their own title by virtue of the right and power given to them when their own charge was created. If the transfer which they held was a sufficient transfer to support registration, I think that there is no ground of equity on which the legal title can be impeached. *Dodds* v. *Hills* (4) appears to be in point on that view of the facts.

But I think it is clear, upon the authority of *Hibblewhite* v. *M'Morine* (5), *Nanney* v. *Morgan* (6), and *Société Générale de Paris*

(1) [1892] A. C. 253, 259.
(2) Law Rep. 18 Eq. 563.
(3) 19 Ch. D. 214.
(4) 2 H. & M. 424.
(5) 6 M. & W. 200.
(6) 37 Ch. D. 346.

v. *Walker* (1), that the bankers never have had the legal estate. If instead of taking the blank transfer they had taken a regular and complete deed of transfer, they would upon registration, and perhaps on delivery for registration—though I express no opinion whether the harbour company would have been compelled to register—have acquired the legal estate. But the *Companies Clauses Consolidation Act* requires a transfer by deed duly stamped, in which the consideration is truly stated; and the transfer which was sent in for registration was not *Edwards's* deed at all. As a transfer to the bankers it was never executed or delivered by *Edwards* or in his presence, or by his authority under seal. I am inclined also to think that it was invalid on the ground that the consideration was not truly stated nor the transfer duly stamped. Under these circumstances, the mere fact of registration, or the issue of a certificate, cannot pass the legal estate. A certificate is by sect. 12 of the Act made *primâ facie* evidence of title, but not conclusive evidence. The bankers, therefore, had only an equitable charge, and the prior equity of the Plaintiffs must prevail. According to this view, the Defendant bankers are not the holders of the stock, and a transfer from them to the Plaintiffs might not have any effect. I think the proper order is to declare that as between the Plaintiffs and the Defendants the Plaintiffs are entitled to the stock and to the dividends received so far as the beneficiaries have not been paid by *Edwards*, and to order that the Defendants are to pay those dividends and to concur in all acts necessary to enable the Plaintiffs to be registered as owners of the stock. This will include the delivery up of the certificate for this purpose. But this order is not to prejudice the bankers as regards any question between them and the harbour company, though I do not mean to suggest that there can be any such question. The Plaintiffs must have their costs.

Solicitors: *Thomas White & Sons; Munns & Longden.*

(1) 11 App. Cas. 20.

H. B. H.

C. A.
1892
STIRLING, J.
May 31; *Nov.* 5, 8.
C. A.
Dec. 12.

In re OTTOS KOPJE DIAMOND MINES, LIMITED.

Company — Transfer of Shares — Refusal to Register Transferee — Certificate issued to Transferor — Liability of Company on — Estoppel — Cause of Action—Non-performance of Duty—Measure of Damages—Jurisdiction to award Damages under Companies Act, 1862 (25 & 26 *Vict. c.* 89), *s.* 35 [*Revised Ed. Statutes, vol. xiv., p.* 210].

A. bought from *B.* 4300 shares in a company upon the faith of a share certificate issued by the company certifying that *B.* was the registered owner of 4300 specified shares in the company. *A.* then tendered to the company a transfer from *B.* to himself duly executed, together with *B.*'s share certificate; but the company, having recently discovered that the certificate had been fraudulently obtained, refused to register the transfer:—

Held, by the Court of Appeal (affirming the judgment of *Stirling*, J.):—

1. That, although the certificate was not a warranty of title upon which *A.* could maintain an action at common law against the company, it estopped the company from disputing *A.*'s right to be registered.

2. That *A.*'s cause of action arose from the refusal of the company to perform the duty of registering a transferee who had shewn what the company were estopped from denying to be a good title.

3. That the measure of damages was the value of the shares at the time of the refusal to register.

The directors of a company are entitled to a reasonable time for the consideration of every transfer before they register it, although not expressly empowered in that behalf by the articles of association.

Semble, the Court has no jurisdiction, under sect. 35 of the *Companies Act*, 1862, to direct a company to pay damages, except in cases where an order is made for rectification of the register.

In re Bahia and San Francisco Railway Company (1) explained.

APPEAL from Mr. Justice *Stirling*.

Mr. *Goode*, a stock-jobber, on the 6th of April, 1892, bought on the *Stock Exchange* 4300 £1 shares in this company, for 2*s.* 6*d.* a share, from Mr. *Gardner*, another stock-jobber, taking his word that he, *Gardner*, was the owner of them.

On the same day *Gardner* brought a transfer duly executed of the 4300 shares from himself to *Goode* in consideration of £537 10*s.* (being the amount of the purchase-money at 2*s.* 6*d.* a share), and delivered it to *Goode*, together with a certificate dated the 23rd of March, 1892, under the seal of the company,

(1) Law Rep. 3 Q. B. 584.

and signed by two of the directors and the secretary, certifying that he, *Gardner*, was the proprietor of 4300 shares, the numbers of which were specified in the certificate, and that the sum of 17*s.* per share, and also a call of 3*s.* per share, had been paid up thereon. *Goode* then paid the purchase-money, executed the transfer himself, and on the same day (April 6) sent it by his clerk to the company's office for registration, accompanied by the certificate. The company's clerk, however, who was acting temporarily as secretary, declined to accept the documents, stating that he had received orders not to do so. Upon hearing this, *Goode*, the same day, went to the company's office, and personally tendered the documents, but they were again refused.

On the 8th of April, 1892, *Goode* and his solicitor, Mr. *Solomon*, again tendered the transfer and certificate, together with the transfer fee, at the company's office, asking that the matter might be dealt with in the usual way. On that occasion the company's clerk said that he had instructions not to accept the documents, and referred *Goode* and Mr. *Solomon* to the chairman of the company. *Goode* and Mr. *Solomon* then had an interview with the chairman, two of the other directors, and the solicitor of the company. Mr. *Solomon* tendered the transfer and certificate, and the company's solicitor took them, but stated that the company did not undertake to register *Goode* as the owner of the shares. Mr. *Solomon* said he had tendered the documents for the purpose of getting Mr. *Goode* registered as owner of the shares; and *Goode* then paid the transfer fee, and took a receipt for the documents, which expressed that they were "to be dealt with in due course."

It appeared from the evidence that the chairman of the company had discovered, on the 5th of April, that a former secretary of the company had made fraudulent transfers of shares, and had falsified the share register, and had by fraudulent means induced two of the directors to sign and affix the seal of the company to the certificate in question without checking it. It further appeared that it was in consequence of this discovery that the transfer and certificate tendered by *Goode* were not taken in. After some further negotiation, the transfer to *Goode* was considered at a board meeting held on the 13th of April, when

C. A. 1892

In re Ottos Kopje Diamond Mines, Limited.

the matter was ordered to stand over for further investigation, and the transfer deed, the certificate, and the transfer fee, were demanded back by and returned to *Goode*.

Goode then moved, under sect. 35 of the *Companies Act*, 1862, that the register of members of the company might be rectified by inserting his name therein as holder of the 4300 shares in question, and that the company might be ordered to pay him the damages suffered by him by reason of their refusal to register him as a shareholder; or, in the alternative, that the company might be ordered to pay him the highest market value of the shares since the tender of the documents on the 6th of April, 1892. Between the 6th and the 13th of April the company's shares had gone down in value; so with reference to the amount to which the applicant would be entitled as damages or otherwise, the question on what day the company had refused to register *Goode* as a shareholder became material.

The company's articles of association, so far as they bore upon the question, were as follows:—

"Article 17. The directors may refuse to register the transfer of any share not fully paid up in any of the following cases: If the transfer is made by a member who is indebted to the company; if the directors are not satisfied with the responsibility of the transferee; if the transferee shall fail to comply with the request made in pursuance of the next article.

"Article 18. Before approving or registering any instrument of transfer of any share, the directors may, if they think fit, require the transferee to produce to and leave at the office of the company for examination the certificate of the shares proposed to be transferred."

"Article 23. All instruments of transfer shall be deposited with the company, and (if required) reasonable evidence shall be given to prove the title of the transferee, and thereupon the secretary shall register such transferee as a member."

The motion was heard on the 31st of May, 1892, when Mr. Justice *Stirling* held, that no order for rectification could be made, but that the case was governed by the decision in *In re Bahia and San Francisco Railway Company* (1), the certificate

(1) Law Rep. 3 Q. B. 584.

C. A.
1892
In re Ottos Kopje Diamond Mines, Limited.

purporting to be a certificate that *Gardner* was the owner of the specific shares, the numbers of which were given. He accordingly directed an inquiry as to what damages had been sustained by *Goode* in consequence of the inability of the company to register him as the transferee of the shares; and ordered that the company should, within fourteen days after the filing of the Chief Clerk's certificate to be made pursuant to the order, pay to the applicant what should be certified to be the amount of such damages. The Chief Clerk, by his certificate dated the 22nd of July, 1892, certified that the amount of the damages sustained by *Goode* was £537 10*s.*, the amount paid by him for the shares on the 6th of April, 1892, together with interest thereon at the rate of 5 per cent. from the 6th of April, 1892, to the time of payment. The company then took out a summons to vary the Chief Clerk's certificate, by decreasing the sum of £537 10*s.*, and disallowing the interest.

Upon this summons, the question was whether the damages should be assessed according to the value of the shares on the 6th of April, 1892, when they stood at 2*s.* 6*d.*, or according to their value on the 13th of April, when they were worth only 2*s.*

The summons came on for hearing upon the 5th and 8th of November, 1892.

Butcher, for the company.

Buckmaster, for *Goode*.

Stirling, J., held, that, by reason of the refusal of the company to receive the transfer upon the 6th of April, *Goode* was, from that date, unable to sell the shares, which were then of the value of 2*s.* 6*d.* per share. The Chief Clerk was, therefore, right in assessing the damages according to the value of the shares on that day. His Lordship directed, however, by consent, that the interest should be computed at the rate of 4 per cent. instead of 5 per cent.; but in other respects he affirmed the decision of the Chief Clerk, and dismissed the summons with costs.

The company appealed. The appeal was heard on the 12th of December, 1892. C. A.

C. A.
1892
In re OTTOS KOPJE DIAMOND MINES, LIMITED.

Butcher, for the Appellants:—

Both under the general law and also under the company's articles of association, the directors were entitled to a reasonable time for consideration whether *Goode* should be registered as a member of the company. He only purchased the shares on the 6th, and on the same day he tendered his transfer; and, having regard to the circumstances of the case, from the 6th to the 13th of April, the date of the board meeting on which the matter was considered and dealt with, was not an unreasonable time for consideration. It was on the 13th of April that the directors, for the first time, refused or omitted to do their duty in registering *Goode*. Until then no cause of action arose, and the damages ought to be assessed according to the value of the company's shares on that day: *Société Générale de Paris* v. *Walker* (1).

Buckmaster, for the Respondent *Goode*:—

The actual value of the shares the Respondent bought on the faith of the certificate issued by the company is *nil*; so the measure of the damage to which he is entitled is, as the learned Judge treated it, the price paid by him on the 6th of April, which is the day on which he bought and on which the company refused to register.

[LINDLEY, L.J.:—This application is in the nature of an action for damages, and I never heard of damages having been directed against a company under sect. 35, except where an order for rectification has been made.]

No question as to the validity of the order made by the learned Judge was raised in the Court below, and no appeal from that order has ever been brought. Mr. Justice *Stirling* has held in another case—*Ex parte Sandys* (2)—that when relief is given under this section the measure of damages is to a certain extent discretionary. But the Respondent is willing to waive all further remedy at law, and to have this application treated as an action for damages at common law.

[LINDLEY, L.J.:—We can so treat it if the parties consent.]

Butcher:—I consent on behalf of the Appellants.

(1) 11 App. Cas. 20, 41.

(2) 42 Ch. D. 98, 109.

Buckmaster:—

Then I rely upon the warranty by the company. *Gardner*, from whom *Goode* bought these particular shares, was the registered holder of them in the books of that company. The Legislature has imposed upon the company the duty of keeping a correct register of its shareholders, and the company is under liability to all persons who are damnified by the breach of their duty. The company issued to *Gardner* a certificate intended to be shewn to and acted upon by a possible purchaser. By that certificate they warranted the shares as good, and in reliance on that warranty of *Gardner's* title *Goode* bought and paid for these worthless shares. The company are, therefore, estopped from denying the truth of their own representation, and must pay the damages he has sustained by acting upon it. These damages are the difference between the value of the shares as they were represented to be and their actual value—*i.e.*, the amount of the purchase-money.

In the case of *In re Bahia and San Francisco Railway Company* (1), it was held that the measure of damages was the value of the shares at the time when the purchaser's name was removed from the register, because up to the date of removal he had been on the register, and had had the full benefit of the shares, including receipt of dividends. So that the price at the date of removal was the full damage that he had suffered by having acted on the faith of the certificate issued by the company, and the case is quite consistent with the argument that if he had never been on the register the measure of damages would have been the money paid for the shares. There was an absolute refusal to register on the 6th of April, when the transfer was first sent for registration. From that moment it was impossible for *Goode* to deal with the shares; and to restore him to his original position he must be repaid his purchase-money. The directors are only entitled to refuse to register transfers on the grounds specified in art. 17, and if they cannot refuse on these grounds, their duty is purely a ministerial one, which they are bound to exercise forthwith. So that the date of the refusal of the secretary, and not that of the refusal of the directors, is the date

(1) Law Rep. 3 Q. B. 584.

C. A. 1892 *In re* Ottos Kopje Diamond Mines, Limited.

when the price of the shares should be ascertained; and that date was the day when the shares were purchased. The measure of damages, therefore, is the same—whether the cause of action was the refusal to register or the breach of warranty.

Butcher, in reply:—

Treating this as an action for damages, it is not founded on misrepresentation, but on refusal to register. To maintain an action for misrepresentation, the Plaintiff must shew that the misrepresentation was fraudulent. By the issue of this certificate the company are no doubt estopped from denying the existence of the state of facts represented by the certificate—*i.e.*, estopped from denying *Gardner's* title to the shares; and they have a duty cast upon them to register *Gardner's* transferee; and if they neglect or refuse to register, they are liable to an action for damages. This certificate, though obtained by fraud from the directors, was issued by them *bonâ fide*, and it constitutes no warranty of title by the company upon which an action for damages can be founded by the transferee: *Tomkinson* v. *Balkis Consolidated Company* (1); *Bishop* v. *Balkis Consolidated Company* (2); *In re Bahia and San Francisco Railway Company* (3); *Hart* v. *Frontino and Bolivia South American Gold Mining Company* (4); *Low* v. *Bouverie* (5).

Lindley, L.J.:—

We have now got at the facts of this case. It comes before the Court in a curious way. By an order, which was not appealed from, dated the 31st of May, 1892, Mr. Justice *Stirling* directed an inquiry as to what damages had been sustained by the Applicant by reason of the directors of the company refusing to register him as the transferee of 4300 shares in the company. All I will say as to that order is, that I doubt whether there was any jurisdiction to make it, for it appears to me that the Court has no jurisdiction under sect. 35 of the *Companies Act*, 1862, to direct the company to pay damages except in cases where an

(1) [1891] 2 Q. B. 614.
(2) 25 Q. B. D. 512.
(3) Law Rep. 3 Q. B. 584.
(4) Law Rep. 5 Ex. 111.
(5) [1891] 3 Ch. 82.

order is made for the rectification of the register. I only make this remark because it must be borne in mind that damages without rectification cannot be obtained by a summons under sect. 35 of the Act of 1862 instead of by an action at law. I pass that by, as no one has raised this question, and the parties have agreed that the Court shall deal with the substantial question, namely, what damages the company ought to pay.

The first contention put forward by Mr. *Buckmaster* was founded upon the supposed authority of *In re Bahia and San Francisco Railway Company* (1). He said that at the time when *Gardner* sold the shares he was the registered holder of them in the books of the company, and when *Goode* was induced to buy the shares from *Gardner* on the faith of the certificate issued by the company, which he produced, the company came under an obligation by way of warranty to indemnify him against any loss he had incurred by buying those shares. But there is no case which goes to that length. I do not think that any action could be maintained upon the footing of a warranty by the company of the truth of the certificate. *In re Bahia and San Francisco Railway Company* was decided upon the footing that a company is bound by an instrument under its common seal, and is estopped by the certificate from denying the validity of the shares. But to give a person who has dealt on the faith of the certificate a right of action against the company there must be some breach of duty towards him by the company. A purchaser of shares can come to the company and produce the certificate and transfer, and say, "Register me as the holder of these shares," and if the transfer is in order and the company is estopped from denying the validity of the shares, they fail in their duty towards him if they do not register him, and an action for that breach of duty will lie. Supposing that I am right, and that *Goode's* cause of action was the improper refusal of the company to register him, the company could not say in answer to that, "Your transferee, *Gardner*, was wrongly on the register." *Goode* would be in a position to say to the company, "You are estopped from raising that defence, and you must register me"; and if they refused there would be a breach of duty on their part

(1) Law Rep. 3 Q. B. 584.

C. A. 1892 *In re* Ottos Kopje Diamond Mines, Limited. Lindley, L.J.

which would be actionable, and in respect of which they would have to pay damages. That is the ground upon which *Goode* would succeed in an action at law in recovering damages from the company.

Then comes the question, What damages ought he to recover? They must be damages to be ascertained as at the time of the refusal to register. Then comes the question, At what time did the company refuse to take the transfer? Upon that there are two different views. Mr. *Butcher* argued that there was no definite refusal until the 13th of April, the date of the first board meeting after the transfer was presented on the 6th. Mr. *Buckmaster*, on the other hand, said that the transfer was refused on the 6th, when it was presented, and that what took place afterwards was only an endeavour to persuade the directors to reconsider their decision and accept the transfer. The 6th was fixed upon as the date upon the ground which I will proceed to explain. It is obvious that on the 5th of April the directors had found out that there was something wrong in the books, and they suspected that there was something wrong in the certificate given by the secretary of the company to *Gardner*; and I think it is plain that, acting upon that suspicion, they gave to the person who was acting temporarily as secretary orders not to take in transfers from *Gardner* to any one; and on the 6th, when *Goode* took in the certificate and transfer, they were then rejected in the sense that the clerk would not receive them. He said, in effect, "I am not going to lay them before the directors—they do not want them"; and they were thus rejected on the 6th, not because the directors wanted time, but because they had made up their minds to reject them. No doubt, as Mr. *Butcher* argued, the directors were entitled to time to consider the documents presented, however regular they might appear to be; but they did not want time when they had already made up their minds that certain transfers were not good. That is really the pith of what took place on the 6th, and it appears to be consistent with what took place on the 8th and afterwards. On the 8th *Goode* and his solicitor went to the directors to try to persuade them to reconsider the matter. They did not then refuse; but after some consideration, on the 8th, the matter was deferred to the 13th;

and on the 13th they did not undo what they had already done.

I come to the conclusion, therefore, that the 6th was the true date on which the transfer was refused without sufficient cause. The directors did not act under arts. 17, 18, and 23. There is no pretence for saying that *Gardner* was indebted to the company, or that *Goode* was not a sufficiently responsible person, and the directors did not reject him on those grounds. They had already made up their minds that they would not accept any transferee from *Gardner*; and on this view, which was the one taken by the learned Judge in the Court below, I think that the finding of the Chief Clerk was right, and that the appeal must be dismissed with costs.

BOWEN, L.J.:—

I am of the same opinion. I think it doubtful whether the application was a proper one to make under sect. 35 of the Act of 1862, as the question is not really one of rectification, but of liability for damages apart from rectification; but as the parties have consented that it shall be treated as a settlement of the questions between them, we have to consider broadly whether the Plaintiff is, as against the company, entitled to damages such as are recognised by the law. The Courts of Law and of Equity have a discretion, when an injury has been done, to assess legal damages as compensation. The damages which can be recovered are only in respect of breach of duty and breach of contract. The breach must be one of commission or of omission. What was it here? Mr. *Buckmaster* has said that the cause of action was the representation contained in the certificate, which in the hands of a transferee amounted to a warranty, or that, in some other way, the giving of a certificate by the company involved them in some liability to the person who received it from the hands of the transferor. It seems to me that the first step to make clear is that the giving of the certificate, although a representation to a possible transferee, does not amount to more than a representation by the company to such transferee,—which was indeed intended to be shewn to him at the time of the sale, but which, as between the company and the transferee,

C. A. 1892 *In re* Ottos Kopje Diamond Mines, Limited. Bowen, L.J.

would not, unless it were fraudulent, give rise to a cause of action at common law, unless there were either a duty on the part of the company towards the transferee, or a contract at common law to make the representation good. That was the decision in *Derry* v. *Peek* (1). If the transferee had a right of action upon the certificate, it could only be because it was an implied warranty between the company and him upon which an action could be brought. There was no privity at all between the company and the transferee. Neither was there any implied warranty.

It was said that the case of *In re Bahia and San Francisco Railway Company* (2) shews that there was a cause of action in the nature of an implied warranty upon the certificate, or breach of warranty arising out of the certificate. A certificate is not like a promissory note: it does not transfer a *chose in action*; it is only a representation. The case of *In re Bahia and San Francisco Railway Company* was, in truth, an attempt, which was successful, to make the company liable—although in the absence of fraud—through the estoppel created by the certificate. The way in which the Court made the company liable was this: they said that inasmuch as the certificate had been intended to be acted upon, it became a document the truth of which the company could not deny as against the transferee to whom it was intended to be shewn; and, therefore, it precluded the company, as against such transferee, from denying the truth of what the certificate contained; they could not be in any better position than if the statement were true; but that only obliged the company to act as if the title, the goodness of which was certified, were in fact good. Until, therefore, the company did something which ought not to be done, or omitted to do something which ought to be done, as between them and the true owner of the shares, no cause of action would arise. That is the true view of the case of *In re Bahia and San Francisco Railway Company*. No cause of action arises upon an estoppel itself. The Court must therefore look for the cause of action elsewhere, upon the assumption that the company cannot dispute the facts stated in the certificate. There must be a refusal by the company to

(1) 14 App. Cas. 337. (2) Law Rep. 3 Q. B. 584.

do what it was bound to do, or a refusal by an officer of the company to do what that officer was bound to do. Now, the refusal relied on by Mr. *Buckmaster* was the refusal by the acting secretary on the 6th of April to take in or consider the transfer. Did he or did he not then refuse to do that which he ought to have done?

I fully coincide with what Lord Justice *Lindley* has said, that the company must be entitled to some time, if they want it, to consider the documents which are brought to them. I know of no case where it has been held that a man is bound to act upon similar documents at the moment that they are presented to him without being allowed time to consider them. I do not think that it was intended in *In re Cawley & Co.* (1) to decide that a company was not entitled to time to consider a transfer; and in *Société Générale de Paris* v. *Walker* (2), Lord *Blackburn* held that they were entitled. It does not, however, follow that the directors did exercise the discretion given them by arts. 17, 18, and 23. In a case which fell within those articles, it would be hard to deny them an opportunity, before determining what they would do, of seeing documents of which they knew nothing; but in the present case the directors were not in that position. They had considered the case the day before; and when the secretary had the documents presented to him on the 6th, they did not want time. Why? Because they had made up their minds already. So that the refusal of the secretary to take the documents was not because the directors wanted time to consider them, but because they had made up their minds not to accept them. It was only on the 8th that the directors looked into the case at all. They ought, if they wanted time, to have accepted the documents on the 6th, and then considered them. It is not a case where it has turned out that the directors had any right on their side. All that they can say is that they were entitled to time to perform a ministerial act—though I should not myself call it a ministerial act—and they only wanted a reasonable time. They had considered the matter, and therefore did not require time at all; so that they cannot put their case on that ground.

(1) 42 Ch. D. 209. (2) 11 App. Cas. 20, 41.

C. A. 1892 *In re* Ottos Kopje Diamond Mines, Limited.

A. L. Smith, L.J.:—

This case resolves itself into a question of fact. It is admitted that the company did refuse to register the transferee, and the sole question now is, Did they do so on the 6th or on the 13th of April? They did not refuse on the 13th. It seems to me that the true inference from the facts is, that the directors had made up their minds on the 5th that something was wrong with the certificate granted to *Gardner*, and they then determined to refuse to transfer the shares standing in his name, whoever the transferee might be; so accordingly when the transfer came from Mr. *Goode* on the 6th, the directors having made up their minds not to take it in, it was refused twice on that day. They then refused to do what they ought to have done, and my Brother *Stirling* was quite right in assessing the damages upon the basis he did. The appeal must be dismissed with costs.

Solicitors: *Foss & Ledsam; J. & M. Solomon.*

W. W. K.

C. A. 1892 ROMER, J. *Aug.* 8, 9. C. A. *Nov.* 18, 19; *Dec.* 19.

MAXIM NORDENFELT GUNS AND AMMUNITION COMPANY *v.* NORDENFELT.

[1891 M. 779.]

Trader—Covenant in Restraint of Trade—Business, Sale of—General Restraint—Partial Restraint—Trade Secret—Time—Space—Articles of English Use—Monopoly—Public Policy—Injunction.

The Defendant, who was interested in several businesses, including the business of a manufacturer of guns and ammunition, in 1886 sold the latter business for a large sum to a limited company, whose business was, in 1888, taken over by the Plaintiffs, another limited company incorporated partly for that purpose; and the Plaintiff company and the Defendant entered into an agreement whereby the Defendant was to act as their managing director at a fixed salary, the Defendant (who was then forty-six years of age) covenanting that he would not "during the term of twenty-five years from the date of the incorporation of the company, if the company should so long carry on business, engage, except on behalf of the company, either directly or indirectly, in the trade or business of a manufacturer of guns or ammunition, or in any business competing or liable to compete in any way with that for the time being carried on by the company"; but other businesses in which the Defendant was interested were excepted from the restriction. Under that agreement the

Defendant acted as the Plaintiff company's managing director until 1890, when he ceased to be such director, and he afterwards joined a rival gun and ammunition company. The Plaintiff company then brought an action against the Defendant to enforce his covenant by injunction:—

Held (reversing *Romer*, J.), that the covenant, as restricted to the gun and ammunition business, though unlimited as to space, and practically covering the remainder of the Defendant's life, was under the circumstances reasonable, and ought to be enforced by injunction.

Covenants in general and partial restraint of trade discussed.

IN and prior to March, 1886, the Defendant *Thorsten Nordenfelt*, who, among other occupations, was a civil engineer, carried on business in *London*, *Stockholm* and elsewhere, as a manufacturer of quick-firing and other guns, gun mountings or carriages, gunpowder explosives or ammunition, and also of various other kinds of explosives, and was the owner of numerous patents for inventions relating to the different businesses then carried on by him. In that month a company called the *Nordenfelt Gun and Ammunition Company, Limited* (hereinafter called the *Nordenfelt Company*) was incorporated under the *Companies Acts*, 1862 to 1886, with a capital of £300,000, its principal object being to acquire and take over one of the Defendant's businesses, namely, that of manufacturing guns, gun mountings or carriages, and gunpowder explosives or ammunition; and under an agreement of the 5th of March, 1886, the Defendant sold to that company the goodwill of that business, with the land, stock-in-trade, plant and machinery, patents, and other property connected with the business, for the sum of £287,500, of which £237,500 was in cash, and £50,000 in fully paid-up shares of the company.

By an agreement for the amalgamation of the *Maxim Gun Company, Limited* (another gun and ammunition company), with the *Nordenfelt Company*, dated the 3rd of July, 1888, and made between the *Maxim Company* of the first part, the *Nordenfelt Company* of the second part, and *Philip Thaine*, on behalf of a company then intended to be and subsequently registered under the name of the Plaintiff company, of the third part, it was agreed that the Plaintiff company should acquire and take over the business, assets, and liabilities of the *Maxim Gun Company, Limited*, and of the *Nordenfelt Company*, upon the terms and conditions therein mentioned.

C. A. 1892 — MAXIM NORDENFELT GUNS AND AMMUNITION COMPANY v. NORDENFELT.

Accordingly the Plaintiff company was incorporated under the *Companies Acts*, 1862 to 1886, on the 17th of July, 1888, with a capital of £1,400,000. Its principal objects, as defined in the memorandum and articles of association, were (*inter alia*):—

(*a*) To acquire, undertake, and carry on, as successors to the *Maxim Gun Company, Limited*, and the *Nordenfelt Company*, the goodwill of the trade and businesses theretofore carried on by such companies, and each of them.

(*b*) To adopt and carry into effect (either with or without modification) the amalgamation agreement of the 3rd of July, 1888.

"(*c*) To carry on, in the *United Kingdom* and elsewhere, the trade or business of manufacturers and vendors of and dealers in all kinds of ordnance and every variety of arms and weapons for military, naval, sporting, and other purposes, including all classes of artillery, guns, rifles, firearms, machine-guns, automatic, electric and pneumatic guns, pistols, torpedoes, swords, bayonets, lances, small-arms and side-arms, with all carriages, cases, fittings, and accoutrements necessary, proper, usual, or expedient to complete or perfect the same or any of them, and also of and in all varieties of ammunition, gunpowder, gun-cotton, fulminates, explosives, caps, fuses, cartridges, cartridge cases, shot, bullets, cannon-balls, shells and projectiles of all kinds for artillery and firearms, and other missiles.

"(*d*) To carry on the business of ship-builders, iron, brass and other metal founders and fitters, machine and engineering tool-makers, mechanical and electrical engineers, millwrights, metal workers, colliery owners, or any other businesses, enterprises, undertakings, operations, or transactions capable of being conveniently carried on in connection with any of the above-mentioned objects, or that may be calculated directly or indirectly to enhance the value of, or render profitable, any business or property of the company.

"(*e*) To purchase or otherwise acquire the right to use any inventions, or secret processes, or any patents, *brevets d'invention*, licenses, concessions, or like privileges, conferring any exclusive or non-exclusive or limited right to use any invention or process, or any secret or information as to any invention or process, which

may seem capable of being used for any of the purposes of the company, or the acquisition of which may seem calculated directly or indirectly to benefit the company."

The Plaintiff company duly adopted and carried into effect the amalgamation agreement of the 3rd of July, 1888, the *Nordenfelt Company* and the *Maxim Company* each receiving, as the consideration for the transfer of its business and assets, £600,000 in shares, and £150,000 in debenture stock of the Plaintiff company.

In pursuance of that amalgamation agreement, an agreement under seal was executed, dated the 12th of September, 1888, and made between the Plaintiff company of the one part, and the Defendant *Nordenfelt* of the other part; its material parts were as follows:—

"(1.) The said *Thorsten Nordenfelt* shall, for a period of seven years from the incorporation of the company, if he shall so long live, retain the necessary share qualification of a director of the company as prescribed by the regulations of the company, and shall, unless incapacitated by death or ill-health, act during such period as a managing director of the company, and manage and conduct, or assist in managing and conducting, the business of the company, and use his best endeavours to promote the interests of the company and develop and extend the business thereof.

"(2.) The said *Thorsten Nordenfelt* shall not, during the term of twenty-five years from the date of the incorporation of the company, if the company shall so long continue to carry on business, engage, except on behalf of the company, either directly or indirectly, in the trade or business of a manufacturer of guns, gun mountings or carriages, gunpowder explosives, or ammunition, or in any business competing or liable to compete in any way with that for the time being carried on by the company; provided that such restriction shall not apply to explosives other than gunpowder, or to subaqueous or submarine boats or torpedoes, or castings or forgings of steel or iron, or alloys of iron or of copper. Provided also that the said *Thorsten Nordenfelt* shall not be released from this restriction by

C. A. 1892

MAXIM NORDENFELT GUNS AND AMMUNITION COMPANY v. NORDENFELT.

the company ceasing to carry on business merely for the purpose of reconstitution or with a view to the transfer of the business thereof to another company, so long as such other company taking a transfer thereof shall continue to carry on the same.

"(3.) The said *Thorsten Nordenfelt*, during such time as he shall continue to act as managing director, shall be paid by the company, by way of a fixed salary or remuneration for his services, the sum of £2000 per annum. . . .

"(4.) The said *Thorsten Nordenfelt* shall also further be entitled, during such time as he shall act as a managing director of the company, by way of further remuneration, to a commission of one per cent. on the net profits of the company available for dividend in each year of the company's working. . . .

"(6.) The said *Thorsten Nordenfelt* also covenants and agrees with the company that, so long as the company or any successor to or assignee of the business of the company shall continue to carry on the business of the company, the company or such successor or assignee shall be entitled to the full and exclusive benefit of all new inventions or improvements now made or discovered, or that may hereafter be made or discovered by him in connection with guns, gun mountings or carriages, gunpowder explosives, or ammunition; and with that object that he will with all convenient speed communicate to the company particulars of any such new invention or improvement made or discovered by him, and will give to the company full information and details thereof, with all models, plans, drawings, and designs, as to the exact mode of working and using the same; and from time to time, at the expense in all things of the company, will execute and do all such documents and things as may be requisite for the purpose of enabling the company to obtain, in its name, or in the name of any nominee, any British, Colonial, or Foreign patent for such inventions and improvements, and will from time to time and at all times give all such advice, explanations, and instructions to the company and its employés as may be necessary to enable them effectually to exercise and work such inventions and improvements.

"(7.) The term patent in this agreement shall mean and include *brevets d'invention*, or any other form of protection for

invention or design that can be obtained in the United Kingdom or any British Colony or Dependency, or in any foreign country."

At the date of that agreement the Defendant was about forty-six years of age. He was then interested in, and, according to the finding of the Court of Appeal, was carrying on, other businesses besides the business which he had sold to the *Nordenfelt Company*, and which was afterwards purchased and taken over by the Plaintiff company, as above stated.

The Defendant was one of the subscribers of the Plaintiff company's memorandum and articles of association, and held a large number of its shares. By the articles he was appointed one of its first directors, and one of its first managing directors.

The Plaintiff company, on its incorporation, proceeded to carry on business as gun and ammunition manufacturers, its business extending to all parts of the world; and in pursuance of the agreement of the 12th of September, 1888, the Defendant acted as one of its directors from the date of the agreement until the month of January, 1890, when he filed a petition for a receiving order in bankruptcy, whereupon he ceased to be one of the managing directors.

On the 16th of September, 1890, the Defendant entered into an agreement with the *Société Cockerill* in *Belgium*, who were manufacturers of quick-firing guns and ammunition, to work for them; and thereupon the Plaintiff company commenced this action, claiming, amongst other relief, an injunction against the Defendant, in the terms of clause 2 of the agreement of the 12th of September, 1888, specific performance of the covenant in clause 6 of the agreement, and damages.

The Defendant, by his statement of defence, alleged that the agreement of the 12th of September, 1888, was broken by the Plaintiff company themselves, and had ceased to be operative; and he contended, in particular, that the restrictions imposed on him by the second clause of it were invalid as imposing restrictions greater than were reasonably necessary for the protection of the Plaintiff company; that they were in fact unnecessary for the protection of the Plaintiff company, and were most oppressive towards him.

C. A. 1892

MAXIM NORDENFELT GUNS AND AMMUNITION COMPANY v. NORDENFELT.

The action came on for hearing before Mr. Justice *Romer* on the 8th of August, 1892.

Sir *H. Davey*, Q.C., *Chadwyck Healey*, Q.C., and *W. F. Hamilton*, for the Plaintiff company:—

There is no affirmative stipulation by the company that they will retain the Defendant's services for seven years, and therefore he cannot complain when, by his own act, he disqualified himself from remaining the managing director. Then, as to clause 2 of the agreement, the restriction against trading is not too wide. The evidence shews that the business of the company is world-wide in its character, and that it extends to all countries and all parts of the world. The larger a business is, the wider and more comprehensive must be such a restrictive covenant for the protection of the purchaser. Under all the circumstances, the covenant was reasonably necessary for the protection of the company, and the fact that it is unlimited as to space is not by itself an objection: *Rousillon* v. *Rousillon* (1); *Davies* v. *Davies* (2); *Mills* v. *Dunham* (3); *Whittaker* v. *Howe* (4). Lastly, the covenant is divisible, and if that portion of it comprised in the words, "or in any business competing, or liable to compete in any way, with that for the time being carried on by the company," is too wide, it may be rejected, and the covenant holds good as to the first portion of it: *Mallan* v. *May* (5).

Rigby, Q.C., *Neville*, Q.C., and *E. Beaumont*, for the Defendant, were not called upon.

ROMER, J.:—

I have come to the conclusion that clause 2 of this agreement is unreasonable, and beyond what I think was required for the reasonable protection of the Plaintiff company. In the first place, Mr. *Nordenfelt* was restrained by it for a period of twenty-five years from the date of the incorporation of the company, which was shortly before the date of the agreement. Well, that

(1) 14 Ch. D. 351.
(2) 36 Ch. D. 359.
(3) [1891] 1 Ch. 576.
(4) 3 Beav. 383.
(5) 11 M. & W. 653.

is a very long period, and is eighteen years beyond the period for which, by clause 1, Mr. *Nordenfelt* had to act as managing director of the company; and, beyond that, even those seven years mentioned in clause 1 might not, for many reasons, have been carried out to their full extent by Mr. *Nordenfelt*. So much for the time. Then what is it that during that long period of time Mr. *Nordenfelt* is not to do? He is not to engage directly or indirectly in, amongst other things, any business competing, or liable to compete in any way, with that for the time being carried on by the company; that being only subject to the restriction that the clause shall not apply to explosives other than gunpowder, or to subaqueous or submarine boats, or torpedoes, castings, and so on. Now, what business might the company for the time being carry on under their memorandum of association? In the first place, the company might at any time carry on the trade or business of manufacturers and founders of and dealers in, amongst other things, all kinds of arms and weapons for any purpose, and all carriages, cases, fittings, and accoutrements necessary or expedient for the same. And, beyond that, under clause (*d*) of the memorandum of association, the company might, at any time, carry on the business of ship-builders, iron, brass, and other metal founders and fitters, machine and engineering tool-makers, mechanical and electrical engineers, millwrights, metal workers, colliery owners, and so on. So, that under clause 2 of the agreement the Defendant might find himself for twenty-five years restrained from carrying on at any moment any of the businesses to which I have referred.

But it is suggested that clause 2 of the agreement is severable, and consists of two distinct covenants, one relating to the business of a manufacturer of guns, gun mountings or carriages, and gunpowder, and the other relating to other businesses, and that even if the latter is bad the first is good. But assuming that the clause is severable so far as concerns the business that the Defendant is prevented from carrying on, and dealing only with the first part of the clause by itself, and disregarding, for this purpose, the subsequent part which deals with any businesses for the time being carried on by the company, still I consider that the period of twenty-five years, without any restriction

C. A. 1892 MAXIM NORDENFELT GUNS AND AMMUNITION COMPANY v. NORDENFELT. Romer, J.

as to space, is beyond what is reasonably necessary for the protection of the company, and that the clause, being unjustifiably in restraint of trade, is void as against the Defendant. I may also point out that, of course, with regard to the businesses I have been referring to, the Defendant, if the Plaintiffs are right, can be restrained from carrying on or being engaged in any of those businesses in any part of the world. For these reasons, I think that the injunction sought for on clause 2 ought not to be granted.

[His Lordship accordingly gave judgment, declaring that the covenant in clause 2 was "void, as being unreasonable and beyond what was required for the protection of the company"; and, his Lordship having decided that clause 6 was binding on the Defendant, an inquiry was directed under that clause, as to patents taken out by him; the costs of that inquiry being reserved: but no order was made as to the other costs of the action.]

H. L. F.

The Plaintiffs appealed from so much of the judgment as declared the covenant in clause 2 to be void.

C. A. The appeal was argued on the 18th and 19th of November, 1892.

Sir *H. Davey*, Q.C., and *W. F. Hamilton*, for the appeal:—

The *onus* is on the Defendant to shew that the covenant into which he entered is unreasonable so as to be void as an undue restraint of trade. It was argued before Mr. Justice *Romer*, and he adopted the view, that the covenant would prevent *Nordenfelt* from carrying on any of the businesses specified in the memorandum of association. But you must construe the covenant with regard to the context and the subject-matter of the agreement: *Ashbury Railway Carriage and Iron Company* v. *Riche* (1); and here, if the covenant is fairly construed, we have a covenant prohibiting particular trades, with general words which are to be taken as referring to trades *ejusdem generis*. But if that be not so, the covenant is severable, as in *Mallan* v. *May* (2), *Price* v. *Green* (3),

(1) Law Rep. 7 H. L. 653. (2) 11 M. & W. 653.
(3) 16 M. & W. 346.

and *Baines* v. *Geary* (1). The objection, therefore, that the restraint extends to trades in which *Nordenfelt* had not been concerned, cannot be sustained.

There have latterly been several cases which throw light on the law as to restraint of trade. In *Davies* v. *Davies* (2), *Cotton*, L.J., thought that a covenant might be good if it was restricted either as to space or time; but that an unrestricted covenant would be necessarily void—in which latter view Lord Justice *Bowen* agreed; though Lord Justice *Fry* said he was still inclined to the view which he had expressed in *Rousillon* v. *Rousillon* (3), that there was no absolute rule that a covenant not limited as to time or space was bad, and that the question in every case was whether the contract was unreasonably large. It is not necessary, however, to consider in the present case whether a covenant unlimited as to time and space is void, for here we have a limit. Some Judges have said that the covenant must be limited as to space; but that is not the doctrine of *Davies* v. *Davies*. Here we have a limit as to time. In *Mills* v. *Dunham* (4), a covenant was enforced though not limited either as to space or time.

[BOWEN, L.J.:—It was limited in its nature.]

Yes; and so limited as to make it not unreasonable. But the case shews that the limitation need not be as to time or space. In *Rousillon* v. *Rousillon*, the law was discussed by Lord Justice *Fry*, who came to the conclusion that it was not essential that the covenant should be limited as to time or space, and that the only question was whether it was reasonable. The same view had been expressed by *James*, L.J., in *Leather Cloth Company* v. *Lorsont* (5). The judgment in *Rousillon* v. *Rousillon* is valuable as laying down, in accordance with *Tallis* v. *Tallis* (6), that the burden lies on the covenantor to shew that the restraint is unreasonable; also as laying down that in dealing with these cases regard must be had to the altered state of the world since the old cases were decided; so that what was

(1) 35 Ch. D. 154.
(2) 36 Ch. D. 359.
(3) 14 Ch. D. 351.
(4) [1891] 1 Ch. 576.
(5) Law Rep. 9 Eq. 345, 354.
(6) 1 E. & B. 391.

C. A. 1892

MAXIM NORDENFELT GUNS AND AMMUNITION COMPANY v. NORDENFELT.

an unreasonable restraint in former times may be a reasonable one now.

[BOWEN, L.J.:—In *Ward* v. *Byrne* (1), a covenant was held bad because not restricted in space.]

In *Wallis* v. *Day* (2), a covenant was held good though not restricted as to space. A table of the earlier cases is given in a note to *Avery* v. *Langford* (3). If the later cases are looked through, such as *Jones* v. *Lees* (4), *Pilkington* v. *Scott* (5), *Hitchcock* v. *Coker* (6), and *Hinde* v. *Gray* (7), it will be found that in none except *Allsopp* v. *Wheatcroft* (8) did the Court refuse to go into the questions of reasonableness or unreasonableness because there was no limit of time or space.

[BOWEN, L.J.:—If the only question is whether the covenant gives a reasonable protection to the covenantee, is not the question always one for the jury? Yet the Judges have always treated it as a question of law.]

The principle on which the Courts deal with such cases is shewn in *Tallis* v. *Tallis* (9), and *Nicholls* v. *Stretton* (10). The principle is that where a covenant of this kind is entered into by a vendor, it is not reasonable that it should go beyond the limits of the business which he sells. In *Badische Anilin und Soda Fabrik* v. *Schott* (11), a world-wide restraint was held good; and so in *Mills* v. *Dunham* (12), and *Mormich* v. *Fenestre* (13).

Sir *J. Rigby*, S.G., *Neville*, Q.C., and *E. Beaumont*, for the Defendant (Respondent):—

The agreement is bad on two grounds: first, the limit of twenty-five years is unreasonable; and, secondly, there is no limit as to space.

Public policy requires that each of Her Majesty's subjects should be at liberty to carry on his own business; no man can

(1) 5 M. & W. 548.
(2) 2 M. & W. 273.
(3) Kay, 663, 667.
(4) 1 H. & N. 189.
(5) 15 M. & W. 657.
(6) 6 A. & E. 438.
(7) 1 Man. & G. 195.
(8) Law Rep. 15 Eq. 59.
(9) 1 E. & B. 391.
(10) 10 Q. B. 346.
(11) [1892] 3 Ch. 447.
(12) [1891] 1 Ch. 576.
(13) C. A., Aug. 11, 1892.

contract not to use his trade at all. That is the general rule: *Mitchel* v. *Reynolds* (1); *Pollock* on Contracts (2).

[LINDLEY, L.J., referred to *Leather Cloth Company* v. *Lorsont* (3).]

No doubt there are some cases in which public policy allows covenants in partial restraint of trade, as in the case of a partner or of a person taken into employment; but in such cases there must, first of all, be a reasonable limit as to space; an absolute covenant in restraint of trade altogether is, we submit, void, and it is not the less so if there is merely a limit as to time. Limitation as to space is essential in order to make a covenant in restraint of trade valid.

[BOWEN, L.J.:—*Printing and Numerical Registering Company* v. *Sampson* (4) seems against you.]

That was the case of a patent. The old rule that the law does not allow an absolute covenant in restraint of trade is still binding: *Davies* v. *Davies* (5), where *Cotton*, L.J., thought that Mr. Justice *Fry* took too wide a view of the law in *Rousillon* v. *Rousillon* (6); *Ward* v. *Byrne* (7). An exception may be made as to certain trades or businesses; but even then the question is whether the restriction is greater than is required for the protection of the imposing party: *Rousillon* v. *Rousillon*. In that case it was held that ten years was not an unreasonable limit of time. So in *Badische Anilin und Soda Fabrik* v. *Schott* (8), Mr. Justice *Chitty*, basing his judgment on *Rousillon* v. *Rousillon*, held a three years' limit not to be unreasonable. To extend the restriction to twenty-five years is unreasonable, for that practically covers the whole life of the contracting party.

[BOWEN, L.J.:—Is not this really an exception, like the case of the sale of a trade secret, with a covenant not to use or divulge it, and, therefore, not within the doctrine of general restraints of trade at all?]

(1) 1 P. Wms. 181; 1 Sm. L. C. 9th Ed. pp. 430, 435.
(2) 5th Ed. p. 340.
(3) Law Rep. 9 Eq. 353.
(4) Law Rep. 19 Eq. 462.
(5) 36 Ch. D. 359, 386.
(6) 14 Ch. D. 351.
(7) 5 M. & W. 548.
(8) [1892] 3 Ch. 447.

C. A. 1892 MAXIM NORDENFELT GUNS AND AMMUNITION COMPANY v. NORDENFELT.

The real question seems to be, Is it lawful for a man to commit industrial suicide? For, if this covenant is good, then, industrially, *Nordenfelt's* career is closed, and the benefit of his inventions is closed to the world. For a covenant of this kind to be valid, if a time limit is necessary it must be a real limit; and there must also be a limit as to space; the limit in both cases must be reasonable. It is clearly laid down in *Mitchel* v. *Reynolds* (1) that a covenant cannot be valid which causes loss of livelihood to the contracting party, or loss to his family of their subsistence, or to the public of his services as a member of it. *Whittaker* v. *Howe* (2) cannot now be considered as law. The first case in which that decision was discussed was in *Tallis* v. *Tallis* (3), during the argument on demurrer (4). There Mr. Justice *Coleridge* said that *Whittaker* v. *Howe* had been doubted, and he referred to *Smith's* Leading Cases (5). *Whittaker* v. *Howe* was next commented on in *Rousillon* v. *Rousillon* (6), and in *Davies* v. *Davies* (7), where *Cotton*, L.J., doubted whether the twenty years' limit was not too long; and in *Allsopp* v. *Wheatcroft* (8), *Wickens*, V.C., declined to follow it.

[LINDLEY, L.J.:—Is there any case in the books in which an agreement by a man who has two businesses not to carry on one of them has been held to be bad?]

We do not know of such a case; but we submit that such an agreement in general terms would be bad; for the law is thus laid down in *Mitchel* v. *Reynolds*: "General restraints are all void, whether by bond, covenant, or promise, &c., with or without consideration, and whether it be of the party's own trade, or not." Here, there is no limit at all as to space; and, as to time, the limit of twenty-five years, covering as it does the whole of a man's working life, is illusory: to allow it would be to whittle away the rule of law altogether, and to substitute a mere technicality. If such a limit is good, why not a term of ninety-nine years? We submit that the decision of the learned Judge below is right.

(1) 1 Sm. L. C. 9th Ed. pp. 430, 434.
(2) 3 Beav. 383.
(3) 1 E. & B. 391.
(4) 16 Jur. 746, n.
(5) 3rd Ed. vol. i. p. 182 a.
(6) 14 Ch. D. 351.
(7) 36 Ch. D. 359, 384.
(8) Law Rep. 15 Eq. 59.

W. F. Hamilton, in reply:—

The question in all these cases is whether the restraint is such as is necessary to afford a fair protection to the interests of the party in favour of whom it is given, and not so large as to interfere with the interests of the public: *Horner* v. *Graves* (1). The decision in *Ward* v. *Byrne* (2), relied on by the Respondent, was really based on the principle that the restraint imposed on the covenantee was unreasonable, and beyond what was necessary for his protection (3). *Allsopp* v. *Wheatcroft* (4), where Vice-Chancellor *Wickens* laid down a hard and fast rule, being apparently misled by the head-note in *Ward* v. *Byrne*, was disapproved of in *Rousillon* v. *Rousillon* (5); where a covenantor carries on many trades, as here, a covenant not to carry on one of them is not void, for he can earn his livelihood by his other trades. As to the twenty-five years' limit being illusory, the same argument might have been used in *Harms* v. *Parsons* (6), where a limit of 200 miles was held to be reasonable, having regard to the nature of the business. I submit that the covenant in the present case was an essential consideration in the purchase of this very valuable business, and is a reasonable covenant, having regard to the nature of the business. The old rule of law, under which contracts have been held void on the ground of public policy, will not, at the present day, be extended: *Mogul Steamship Company* v. *McGregor, Gow & Co.* (7).

1892. Dec. 19. LINDLEY, L.J.:—

The question raised by this appeal is whether a covenant entered into by the Defendant with the Plaintiffs is valid and ought to be enforced or not. The Plaintiff company was formed and registered in July, 1888. Its objects, as set out in its memorandum of association, were as follows. [His Lordship read clauses (*a*) to (*d*), above stated, and continued:—]

The Defendant, who is, *inter alia*, a civil engineer and a patentee and manufacturer of quick-firing guns and of

(1) 7 Bing. 735, 743.
(2) 5 M. & W. 548.
(3) Ibid. 559.
(4) Law Rep. 15 Eq. 59.
(5) 14 Ch. D. 351.
(6) 32 L. J. (Ch.) 247.
(7) [1892] A. C. 25, 45.

C. A. 1892

MAXIM NORDENFELT GUNS AND AMMUNITION COMPANY *v.* NORDENFELT.

Lindley, L.J.

ammunition, formerly carried on those businesses on his own account; but in 1886 he sold them to the *Nordenfelt Company*, which is one of the companies whose businesses the Plaintiff company was formed to buy and carry on. The Defendant not only became the holder of a large number of shares in the Plaintiff company, but he was one of its first directors and one of its first two managing directors. The Defendant also carried on various other businesses, besides those which he had sold to the *Nordenfelt Company*, and in September, 1888, he was forty-six years of age or thereabouts. On the 12th of September, 1888, a deed was executed by the Plaintiff company and by the Defendant, pursuant to arrangements entered into before the formation of the Plaintiff company, and by that deed it was covenanted between the parties as follows. [His Lordship then read the clauses above stated, and continued:—]

The Defendant acted as managing director of the Plaintiff company until January, 1890, when, owing to disputes, he resigned, and since his resignation he has made arrangements for carrying on business in rivalry with the Plaintiff company, contrary to the express terms of his covenant, and it is admitted that he is doing so, and intends to do so. He has joined a foreign company which is a rival to the Plaintiff company. This action is brought for the purpose, *inter alia*, of restraining the Defendant from so acting. Mr. Justice *Romer* has refused to grant the Plaintiffs any relief in respect of the above covenant, holding it to be void upon the ground that it is within the mischief which renders all covenants against trade generally invalid. Hence this appeal.

Before examining the legal points which arise in this case, it is desirable to make a few observations on the undisputed facts. The primary object and main business of the Plaintiff company was to buy up and carry on the businesses of the *Maxim Gun Company* and the *Nordenfelt Guns and Ammunition Company*—*i.e.*, the businesses of manufacturing guns, gun mountings or carriages, gunpowder explosives or ammunition. These businesses were of such a nature as to admit of competition anywhere in or out of *Great Britain*. The principal customers of the Plaintiff company would necessarily be sought amongst the

Governments of the world; and in a business point of view it is difficult, if not impossible, to assign any limits within which a rival business could be carried on without serious injury to the Plaintiff company. The other businesses which the Plaintiff company might carry on are easily distinguishable from the above, and are not businesses in which the Defendant was likely to become a rival.

The acquisition of the business of the *Nordenfelt Company*, which the Plaintiff company was buying, involved the acquisition of numerous patents held by the Defendant. One main object of this action is to compel him to assign these patents to the Plaintiff company, pursuant to his agreement; and the Defendant has been ordered to do this, and he has not appealed from the judgment against him in this respect.

The covenant by the Defendant not to carry on business ought not to be regarded apart from, and as having no connection with, the assignment of these patents. The assignment of them would alone prevent the Defendant from using them in this country whilst they subsisted, but of course no longer. The duration of the covenant is confined to twenty-five years, if the company, or any successors to its business, should so long continue to carry on business. I do not regard this limit of time as illusory and equivalent to the life of the covenantor, although no doubt it might cover the whole of his business life, considering his age when he entered into the covenant. On the other hand, the Defendant might live and carry on business long after attaining seventy-one, which would be his age at the end of the twenty-five years. The Defendant is free to carry on the business of making explosives, other than gunpowder explosives, and to make subaqueous or submarine boats or torpedoes, and to make castings or forgings of steel or iron, or alloys of iron or of copper. So far as the interests of the Plaintiff company and of the Defendant are concerned, I cannot myself see anything unreasonable in a person skilled in several businesses, and forty-six years of age, agreeing to sell some of those businesses, and reserving the others to himself, and agreeing not to compete for twenty-five years with the purchaser of the businesses which he sells.

From what point of view is such a bargain unreasonable? Not

C. A. 1892

MAXIM NORDENFELT GUNS AND AMMUNITION COMPANY v. NORDENFELT.

Lindley, L.J.

from the buyer's; he is in no way hurt, unless he has paid too high a price for what he gets, and whether he has or has not is really immaterial to the present inquiry. Not from the seller's; he gets the best price for what he wishes to sell, and he retains the right to carry on those businesses which alone he desires to carry on. Are the public—*i.e.*, the English or British public—injured by such a bargain? I cannot see how. The public are, no doubt, deprived of such advantages as may flow from the Defendant's personal attention to some businesses, unless he carries them on on behalf of the Plaintiff company; but, on the other hand, the public get such advantages as may flow from his giving his undivided attention to those other businesses which he has chosen to retain, and to which he has preferred to devote himself. As regards the idea of monopoly, the Plaintiff company, as the assignee of the Defendant's patents, obtains the exclusive right to use them, anywhere and everywhere in *England*, whilst they are in force; and to prevent the Defendant from using them for a few years longer can hardly be held to be against public policy. I am not aware of any decision to that effect, and I am not prepared to lay down any such proposition. The interest of the public is no doubt adverse to monopolies and to restrictions on trade; but then its interest is to allow its members to carry on those businesses which they themselves prefer, and to abandon and sell to the best advantage those businesses which for any reason they do not wish to continue.

It is, however, strenuously contended that there are certain settled rules of law which make such a covenant as is here sought to be enforced invalid, and therefore not binding. The contention is that the Defendant's covenant in this case imposes upon him a restraint, which is general, not to carry on a particular business anywhere in the *United Kingdom*, and must, therefore, be void, as said by Chief Justice *Parker* in *Mitchel* v. *Reynolds* (1). In the judgment in that case it is laid down that a covenant which imposes a general restraint not to exercise a trade throughout the kingdom must be void, being of no benefit to either party, and only oppressive; that general restraints are all void, whether by bond, covenant, or promise, &c., with or without consideration, and

(1) 1 P. Wms. 181; 1 Sm. L. C. 9th Ed. p. 430.

whether it be of the party's own trade or not; that to obtain the sole exercise of any known trade throughout *England* is a complete monopoly and against the policy of the law; that no man can contract not to use his trade at all; and in other parts of that judgment these topics are further enlarged upon. A sharp line is drawn between general restraints not to carry on a particular trade anywhere in *England*, and partial restraints, which are not so extensive. The former are condemned because they cannot be of any use to the covenantee, and must be to the detriment of the English public. The latter are allowed, provided they are founded on a sufficient or good and adequate consideration, and are not unduly oppressive—*i.e.*, not more extensive than is reasonably necessary for the protection of the covenantee.

Such I take to be the law as laid down in *Mitchel* v. *Reynolds* (1), in which an attempt was made to shew how two conflicting principles might be harmonized. On the one hand, it was against public policy to allow any particular trade to be monopolized, and to prevent any man from earning his living in any way he could. On the other hand, it was equally against public policy to restrain a man from selling his services or his business to the best advantage; and the price he would get for them or it would naturally depend on whether he was or was not to be at liberty to compete with the purchaser.

It is curious to observe how the law upon this subject has gradually been relaxed to suit developments of trade, and has been made conformable to modern ideas and views of public policy and of reasonableness. In the times of *Henry* V. and of *Elizabeth* covenants even in partial restraint of trade were held contrary to public policy, although they have long since ceased to be so regarded: see *The Dyer's Case* (2) and *The Blacksmith's Case* (3), the substance of which will be found in *Pollock* on Contracts (4). When *Mitchel* v. *Reynolds* was decided, and for many years afterwards, it was considered that the consideration for covenants in partial restraint of trade must be adequate. This, however, was held in *Hitchcock* v. *Coker* (5) not

(1) 1 P. Wms. 181; 1 Sm. L. C. 9th Ed. p. 430.
(2) 2 Hen. 5.
(3) 29 Eliz.
(4) 5th Ed. p. 341.
(5) 6 A. & E. 438.

C. A. 1892

MAXIM NORDENFELT GUNS AND AMMUNITION COMPANY v. NORDENFELT.

Lindley, L.J.

to be necessary, and the old view on this point has never since been entertained.

Again, it used to be considered that in actions on covenants in partial restraint of trade there was a presumption rather against than in favour of the validity of the covenant; but in *Hitchcock* v. *Coker* (1), and again in *Tallis* v. *Tallis* (2), this view was held to be erroneous, and covenants in partial restraint of trade were upheld which were not shewn to be unreasonable on the ground that they extended further than was required for the protection of the covenantee.

As regards space, the old doctrine certainly was that a covenant not to carry on a particular business anywhere in *England* was invalid. But this was because in former times it was thought impossible that so wide a covenant could be necessary for the reasonable protection of the covenantee, and it was thought that so wide a covenant must necessarily be injurious to the public interest. A little consideration, however, will shew that in modern times, and as business is now carried on, neither of these reasons is universally true, and the rule which condemns all covenants not to carry on a particular trade anywhere in *England* must have some exception or qualification, or be quite unfitted for modern use. Suppose, for instance, that an English patentee sells his patent, and covenants that during its subsistence he will not carry on any business in *England* which involves any infringement of the patent, and that if he does he will pay the purchaser certain sums by way of liquidated damages. No one, I apprehend, could possibly hold the covenant to be invalid simply because it extended to the whole of *England*. To adhere in all cases to the old rule that a covenant in restraint of trade must be void if it extends to the whole of *England*, will frequently be found to sacrifice the principle which underlies the rule to the rule itself; and, whenever this is the case, to adhere to the rule is as contrary to sound legal principles as it is contrary to good sense.

Accordingly, whilst the principle on which the old division of restraints into general and partial depended ought not to be lost sight of, and has been constantly enforced in many modern

(1) 6 A. & E. 438. (2) 1 E. & B. 391.

instances, there are, on the other hand, several cases in which covenants in restraint of trade have been held valid, although the restraint extended over the whole of *England*. When, however, these cases are examined, they will be found to conform to the principle which underlies the reasoning of the judgment in *Mitchel* v. *Reynolds* (1), for in those cases the restraint was not greater than the protection of the covenantee required, and the covenant, taken in connection with the business to which it referred, could not be said to be injurious to the public interests.

The cases to which I more particularly refer are: *Wallis* v. *Day* (2); *Jones* v. *Lees* (3); *Leather Cloth Company* v. *Lorsont* (4); *Rousillon* v. *Rousillon* (5); *Badische Anilin und Soda Fabrik* v. *Schott* (6).

Whittaker v. *Howe* (7), in which Lord *Langdale* enforced a covenant by a solicitor not to practise anywhere in the *United Kingdom*, went, I think, too far, because there was nothing to take the case out of the general rule which invalidates so wide a covenant. The covenant imposed a greater restraint than the protection of the covenantee required, and was therefore, in any view, contrary to public policy. The Vice-Chancellor *Wickens* declined to follow the case in *Allsopp* v. *Wheatcroft* (8), but he thought the want of limit as to space necessarily fatal; and Lord Justice *Cotton*, I think, took the same view in *Davies* v. *Davies* (9). But this, again, is not, in my judgment, correct in all cases without exception. In *Rousillon* v. *Rousillon*, Lord Justice *Fry*, in one of those admirable judgments for which he was so justly celebrated, came to the conclusion that the only test by which to determine the validity or invalidity of a covenant in restraint of trade given for valuable consideration was its reasonableness for the protection of the trade or business of the covenantee. This accords with the view of Lord Justice *James* in *Leather Cloth Company* v. *Lorsont*, and is, in my opinion, the doctrine to which the modern authorities have been gradually approximating. But I cannot regard it as finally settled, nor, indeed,

(1) 1 P. Wms. 181; 1 Sm. L. C. 9th Ed. p. 430.
(2) 2 M. & W. 273.
(3) 1 H. & N. 189.
(4) Law Rep. 9 Eq. 345.
(5) 14 Ch. D. 351.
(6) [1892] 3 Ch. 447.
(7) 3 Beav. 383.
(8) Law Rep. 15 Eq. 59.
(9) 36 Ch. D. 359.

C. A. 1892 — MAXIM NORDENFELT GUNS AND AMMUNITION COMPANY v. NORDENFELT. — Lindley, L.J.

as quite correct. The doctrine ignores the law which forbids monopolies and prevents a person from unrestrictedly binding himself not to earn his living in the best way he can. Our predecessors expressed their views on this subject by drawing a distinction between partial and general restraint of trade, and this distinction cannot be ignored. But what is more important than nomenclature or classification is the principle which underlies both.

I have endeavoured to arrive at and to express the principle on which this branch of the law is founded, and, applying it to the present case, I have come to the conclusion that the Defendant's covenant is not wholly void, but that it is valid, and ought to be enforced to the extent to which the Plaintiff company seeks to enforce it. My reasons are as follows: (1.) The covenant is severable; and if, as I think is the case, the covenant is too wide in its application to any business which the company may carry on during twenty-five years, still the covenant may be and is valid as regards the gun and ammunition business: see *Mallan* v. *May* (1); *Price* v. *Green* (2); *Baines* v. *Geary* (3). (2.) The covenant thus restricted, although unlimited as to space, and in that sense and to that extent general, is nevertheless not contrary to public policy, and, therefore, not contrary to the rule which forbids general as distinguished from partial restraints. In the first place, the covenant is part of a transaction for securing to an English company the inventions and business of a foreigner. The transaction, and the covenant as part of it, encourage rather than restrict trade in this country. In the next place, the business to which the covenant relates is very peculiar, owing to the small number and character of possible customers. Then, again, the assignment of the patents and their connection with the covenant prevent the covenant, for some years at all events, from having any tendency to produce a monopoly not already produced by the patents, and also prevent the covenant from imposing any undue restriction on the liberty of the Defendant to carry on the businesses to which the covenant, as restricted, relates; and I can see no reason for

(1) 11 M. & W. 653. (2) 16 M. & W. 346.
(3) 35 Ch. D. 154.

holding that the possible duration of the covenant beyond the expiration of the patents invalidates the covenant. Further, our predecessors, from whom we inherit this branch of the law, would never have thought it contrary to public policy to prevent a man from assisting foreigners to compete with an English trader who had bought his business; and I am not aware that it has ever been judicially held to be contrary to public policy to give effect to a covenant entered into for such a purpose. Lastly, the covenantor is at liberty to carry on the specified businesses on behalf of the company, and is also at liberty to carry on for his own benefit the other businesses reserved to himself, and to which he prefers to devote his attention.

(3.) Apart from public policy, the covenant in question is reasonable as restricted. So restricted, it is not wider than is reasonably necessary for the protection of the interests of the covenantee.

On these grounds I am of opinion that the appeal ought to be allowed. The order appealed from ought to be varied by declaring that the covenant in question is valid so far as it relates to the trade or business of a manufacturer of guns, gun mountings or carriages, and gunpowder explosives or ammunition. An injunction restricted to those businesses ought to issue, and an inquiry ought to be directed to assess the damages sustained by the Plaintiff company by reason of the breach by the Defendant of his covenant as restricted; and the Defendant ought to pay the costs of the appeal and also the costs of the action, except those expressly reserved by the order of Mr. Justice *Romer*.

BOWEN, L.J.:—

There was an early period in English history when the Courts set their face apparently against all restrictions upon trade alike whether limited or unlimited. This period has long since passed away; but it has been, in my opinion, the doctrine of the Courts of common law, ever since the reign of Queen *Elizabeth*, that contracts in general restraint of trade are void as being contrary to public policy. Contracts in general restraint of trade may be defined as those by which a person restrains himself from all

C. A. 1892 — MAXIM NORDENFELT GUNS AND AMMUNITION COMPANY v. NORDENFELT. — Bowen, L.J.

exercise of his trade in any part of *England*. A mere limit in time has never been held to convert a covenant in general restraint of trade into a covenant of particular or partial restraint of trade. It is necessary to insist on this distinction, which is embedded in the reports and text-books of the last three centuries; since it is through not preserving the exact meaning of the term "in general restraint of trade" that some confusion has apparently at times arisen. The common law is as precise as it can be on the point. Contracts unlimited in area, although they may be limited in time, are, as a rule, held bad on the ground of public policy.

The broad principle is to be found as far back as the year 1614 in *Rogers* v. *Parry* (1) and in *Broad* v. *Jollyfe* (1620) (2). It is re-affirmed explicitly by Chief Justice *Parker* in the leading case of *Mitchel* v. *Reynolds* (1711) (3), where "general restraint of trade" is explained and defined. The doctrine is assumed to be unquestioned in *Chesman* v. *Nainby* (1726) (4) and in *Clerke* v. *Comer* (1734) (5). "Any deed," says Chief Justice *Best*, in *Homer* v. *Ashford* (1825) (6), "by which a person binds himself not to employ his talents, his industry, or his capital, in any useful undertaking in the kingdom, would be void." A note to *Hunlocke* v. *Blacklowe* (7) sufficiently states the reason why a covenant does not cease to be in general restraint of trade merely because the time is limited. "The principle," says the learned editor, "on which restraints of trade, partial in point of space, have been supported, has not been applied to restraints general in point of space, but partial in point of time; for that which the law does not allow is not to be tolerated because it is to last for a short time only."

A similar explanation is given by Mr. Baron *Parke* in *Ward* v. *Byrne* (1839) (8), where a covenant indefinite as to the area of restraint, but limited to nine months after the end of the covenantor's employment, was held void in law. "When," he says, "a general restriction, limited only as to time, is

(1) B. R. Trin.; 11 Jac. 1 Rot. 223; 2 Bulst. 136.
(2) Cro. Jac. 596.
(3) 1 P. Wms. 181.
(4) 2 Ld. Raym. 1456, 4th Ed. by *Bayley*.
(5) Cas. t. Hardw. 53.
(6) 3 Bing. 322, 326.
(7) 2 Wms. Saund. (6th Ed.) 156 b.
(8) 5 M. & W. 548, 562.

imposed, the public are altogether losers, for that time, of the services of the individual, and do not derive any benefit whatever in return; and looking at the authorities cited upon this subject, it does not appear that there is one clear authority in favour of a total restriction on trade, limited only as to time." An ambiguous expression as to limits in respect of time in the case of the *Gunmakers' Company* v. *Fell* (1) is explained by Baron *Parke*, and is due probably to an oversight. Baron *Rolfe's* judgment is on the same lines as that of Baron *Parke*. Partial restrictions, he says, "have always left things in this state, that, when allowed, a portion of the public is not injured at all; that portion of the public to which the restriction does not extend remains exactly as it did before the restriction took place. But in this case"—viz., in a case of general restraint for a time certain—"the whole of the public is restrained during the period in question."

Ward v. *Byrne* (2) was followed, in 1840, by *Hinde* v. *Gray* (3). Chief Justice *Tindal* repeats the proposition in *Proctor* v. *Sargent* (1840) (4): "Where we once hold a restriction to be unreasonable in point of space, the shortness of the time for which it is imposed will not make it good."

The truth is that the classification which seems to distinguish restraints which are limited in point of space from restraints which are limited in respect of time is a cross division. The antithesis between time and space looks so plausible that some text-books, and more than one Judge in the last few years, have lapsed into the mistake of supposing that it corresponds in some way to the line of cleavage upon which general restraints and partial restraints are divided. "In respect of space," says Lord *Campbell* in *Tallis* v. *Tallis* (1853) (5), "there must be some limit." Since the reign of Queen *Elizabeth* the common law authorities are really—all of them—one way. Scores of cases have proceeded on this basis; and those who dispute the rule can only do so, as it seems to me, by disregarding the judgments and opinions of an uncounted number of unanimous common law Judges.

(1) Willes, 384, 388.
(2) 5 M. & W. 548.
(3) 1 Scott, N. R. 123.
(4) 2 Man. & G. 33.
(5) 1 E. & B. 391, 411.

C. A. 1892 — MAXIM NORDENFELT GUNS AND AMMUNITION COMPANY v NORDENFELT. — Bowen, L.J.

Distinguished from these general restraints, which the English law discountenances, are partial or limited restraints, or, as they are sometimes termed, particular restraints, which, upon certain conditions, the English law permits and enforces. An agreement in "particular" or "partial" restraint of trade may be defined as one in which the area of restriction is not absolute, but in which the covenantor retains for himself the right still to carry on his trade either in some place, or for the benefit of some persons, or in some limited or prescribed manner. Particular restraints, according to the language employed in *Mitchel* v. *Reynolds* (1), are those in which there is some limitation in respect of places or persons short of an absolute and total restriction. But there is also a third kind of limitation which the law will sanction under reasonable conditions—namely, a limitation in respect of the mode or manner in which a trade is to be carried on.

The above are the three kinds of partial restraint recognised by the law. The English rule, which strikes indifferently at all general restraints in trade, makes the validity of a partial restraint depend on the circumstances of each case. A partial restraint will be binding in law if made on good consideration and if it is reasonable: *Collins* v. *Locke* (2). In the history of the application to partial restraints of this test, the Courts of common law from time to time have been driven by good sense and by altered social circumstances to make gradual advances in the direction of toleration and indulgence. Judges as far back possibly as the reign of *Henry* V., and certainly during the reign of Queen *Elizabeth*, appear, as has been already stated, to have considered that even partial restraints of trade were uniformly bad in law. But as trade progressed it was necessarily discovered that a doctrine so rigid must be injurious to the State itself. In the same way and at about the same date by-laws which were in mere regulation of trade came to be distinguished by the Courts from those which were in unlimited restraint of it. Nevertheless, as late as the year 1601, in *Colgate* v. *Bacheler* (3), the Court held that it was against law to prohibit or restrain

(1) 1 P. Wms. 181; 1 Sm. L. C. 9th Ed. p. 430.

(2) 4 App. Cas. 674, 686.

(3) Cro. Eliz. 872.

"any to use a lawful trade at any time or at any place." This severe view is recorded in a *dictum* of Justice *Croke* (1613), in *Rogers* v. *Parry* (1), though it was repudiated by Chief Justice *Coke* and the remainder of the Court.

One reason for the adoption of a more elastic doctrine appears from a judgment delivered in *Broad* v. *Jollyfe* (1620) (2). In *London* and other large towns it had become usual already for traders to let their shops and wares to their servants when they were out of their apprenticeship; and for the servants to covenant that they would not use that trade in such a shop or in such a street. The Courts, yielding to the progress of industry and commerce, finally decided that a man might restrain himself voluntarily and upon valuable consideration from using his trade in a particular place. The *onus*, however, at this time still lay on the covenantee to shew that the covenant on which he was insisting had been made for good consideration, and that it was reasonable. The law is so expounded in *Mitchel* v. *Reynolds* (1711) (3): "A particular restraint is not good without just reason and consideration" (4). In 1726 (*Chesman* v. *Nainby* (5)), the House of Lords affirmed the doctrine and the qualification, and their decision was followed in *Clerke* v. *Comer* (1734) (6); *Davis* v. *Mason* (1793) (7), and *Bunn* v. *Guy* (1803) (8). The reason for favouring such partial restraints is enforced also in *Homer* v. *Ashford* (1825) (9). "It may often happen," says Chief Justice *Best*, "that individual interest, and general convenience, render engagements not to carry on trade or to act in a profession in a particular place, proper." Down to as recent a period as *Young* v. *Timmins* (1831) (10), it was still, however, considered to be for the person propounding a contract in partial restraint of trade to satisfy the Court of the adequacy of the consideration. It was only in 1837, in *Hitchcock* v. *Coker* (11), that a fresh step forward was taken in reference to partial restraints of trade. The Exchequer Chamber there for the first time decided that

(1) B. R. Trin.; 11 Jac. 1 Rot. 223; 2 Bulst. 136.
(2) Cro. Jac. 596.
(3) 1 P. Wms. 181.
(4) Ibid. 187.
(5) 2 Ld. Raym. 1456; 1 Bro. P. C. 234.
(6) Cas. t. Hardw. 53.
(7) 5 T. R. 118.
(8) 4 East, 190.
(9) 3 Bing. 322, 326.
(10) 1 Tyrw. 226.
(11) 6 A. & E. 438.

C. A. 1892 — MAXIM NORDENFELT GUNS AND AMMUNITION COMPANY v. NORDENFELT. — Bowen, L.J.

in cases of partial restraint, the examination of the adequacy of the consideration was not properly for the Court, but for the parties, although the burden remained as before upon the covenantee to shew that there was some good and valuable consideration. The cases of *Wallis* v. *Day* (1837) (1), *Leighton* v. *Wales* (1838) (2), and *Archer* v. *Marsh* (1837) (3), were determined on the amended principle. By this date the idea was fully recognised, that all partial restraints of trade which satisfied the conditions of the law as to reasonableness and good consideration were not an injury, but a benefit to the public: *Ward* v. *Byrne* (1839) (4); *Proctor* v. *Sargent* (1840) (5); *Rannie* v. *Irvine* (1844) (6), per *Maule*, J.; *Mallan* v. *May* (1843) (7).

A further progress in the views with which the law regarded partial restraints was made in *Tallis* v. *Tallis* (1853) (8). It was then at last resolved that the *onus* lay upon the person who attacked a covenant in partial restraint of trade to displace the consideration—a change in the position of the parties which is illustrated by the language of Chief Justice *Erle* in *Mumford* v. *Gething* (1859) (9): "Contracts in partial restraint of trade are beneficial to the public, as well as to the immediate parties." See also *Harms* v. *Parsons* (10).

Cases where the contract still leaves to the covenantor a right to trade with particular persons fall, as has been pointed out, under the same head as those where the restraint is partial in respect of space. In both instances alike the restriction upon the trade is not general but limited in area, and such contracts, if reasonable and for good consideration, will be supported by the law. The trader, it is true, is prohibited in such cases from serving a portion of the public; but trade in another quarter is still left open to him. "Where one party," says Lord *Lyndhurst*, in *Young* v. *Timmins* (11), "agrees to employ another in the way of his trade, and the other undertakes to work exclusively for him, that is a particular restraint of trade which

(1) 2 M. & W. 273.
(2) 3 M. & W. 545.
(3) 6 A. & E. 959.
(4) 5 M. & W. 548, 559.
(5) 2 Scott, N. R. 289.
(6) 7 Man. & G. 969.
(7) 11 M. & W. 653.
(8) 1 E. & B. 391.
(9) 7 C. B. (N.S.) 305, 319.
(10) 32 L. J. (Ch.) 247.
(11) 1 Tyrw. 226, 236.

may be supported by proof of adequate consideration." The covenant in *Wallis* v. *Day* (1) was of this description, and was pronounced good by the Court, although its validity was not in fact a necessary condition to the plaintiff's success in that description of action. "It cannot be said," according to Lord *Abinger* (2) "to be a contract in absolute restraint of trade, when he" (the contractor) "contracts to serve another for his life in the same trade." Instances where one trader covenants not to supply the customers of another, such as in *Rannie* v. *Irvine* (3), fall within this category. "It is to be observed," says Chief Justice *Tindal* (4), "that this is not a general restraint of trade, but only restricts the defendant from trading with a very limited number of persons." So also *Pilkington* v. *Scott* (5).

Lastly, a covenant ceases to be referable to the class of general restraints of trade when it only regulates or confines the manner in which the trade is to be worked. Such contracts are contracts in partial restraint of trade only, and are recognised accordingly as valid if reasonable and for good consideration: see *Collins* v. *Locke* (6). *Jones* v. *Lees* (7) is an illustration of this branch of partial restraints. The plaintiff, who was the owner of a patent, had sold to the defendant a license to use a patented invention, the defendant covenanting in turn that he would not make any machines in future without applying the invention to what he so made. If the defendant covenanted, on the one hand, not to sell the machine without the patented invention, he obtained the privilege, on the other hand, of selling the same machine with that improvement to all *England*. This, as is pointed out in *Wms. Saunders* (8), is a restraint which affects the mode of exercising the trade, and which, therefore, is partial. The only real question that remained, on such a view of that particular bargain, was whether it was a reasonable one, as to which point the remark that the privilege was commensurate with the restraint appears conclusive. The case is similar to

(1) 2 M. & W. 273.
(2) Ibid. 281.
(3) 7 Man. & G. 969.
(4) Ibid. 976.
(5) 15 M. & W. 657.
(6) 4 App. Cas. 674.
(7) 1 H. & N. 189.
(8) 2 Wms. Saund. 156 a, n.

C. A. 1892 MAXIM NORDENFELT GUNS AND AMMUNITION COMPANY v. NORDENFELT. Bowen, L.J.

those in which rules regulating trade have been distinguished from rules made in restraint of it: *Freemantle* v. *Silk Throwsters' Company* (1668) (1); *Wannel* v. *Chamberlain of London* (1725) (2); *Bosworth* v. *Hearne* (1737) (3); *Harrison* v. *Godman* (1756) (4); *Rex* v. *Harrison* (1762) (5). The inquiry as to the reasonableness of the restraint in any particular instance is, however, one that appertains only to the case of partial restraints. It is no objection necessarily to such partial restraints that they are sometimes to continue during the life of the covenantor, who may possibly survive the covenantee, for such an arrangement enables the goodwill of the business to become the object of purchase and sale: *Atkyns* v. *Kinnier* (6); *Pemberton* v. *Vaughan* (7).

Such is a *résumé* of the history of the common law doctrine as to restraint of trade. The first cloud upon the clear sky of the common law narrative comes in the equity decision of Lord *Langdale* in *Whittaker* v. *Howe* (1841) (8)—a decision all the more inexplicable since it was given within three or four years of *Hitchcock* v. *Coker* (9), *Wallis* v. *Day* (10), *Leighton* v. *Wales* (11), *Archer* v. *Marsh* (12), *Ward* v. *Byrne* (13), *Hinde* v. *Gray* (14), and *Proctor* v. *Sargent* (15), from a careful study of which cases alone the broad doctrine of the law as I have above described it may be gathered with perfect ease. The case of *Whittaker* v. *Howe* was one in which a solicitor, for valuable consideration, agreed not to practise as a solicitor in any part of *Great Britain* for twenty years. Everything appears clear in the case except the judgment of the Court. The covenant was not a covenant in partial but in general restraint of trade; and, the restraint of trade being a general one, the Court had nothing to do with the reasonableness of the transaction. Lord *Langdale*, nevertheless, begins by stating that the question was whether the restraint intended to be imposed on the defendant was reasonable; and

(1) 1 Lev. 229.
(2) 1 Str. 675.
(3) Andr. 91.
(4) 1 Burr. 12.
(5) 3 Burr. 1323, 1328.
(6) 4 Ex. 776, 782.
(7) 10 Q. B. 87, 89.
(8) 3 Beav. 383.
(9) 6 A. & E. 438.
(10) 2 M. & W. 273.
(11) 3 M. & W. 545.
(12) 6 A. & E. 959.
(13) 5 M. & W. 548.
(14) 1 Scott, N. R. 123.
(15) 2 Scott, N. R. 289.

he cites as a guide for himself the words of Chief Justice *Tindal* in *Horner* v. *Graves* (1). Yet *Horner* v. *Graves* is an instance of partial and not general restraint of trade, and Chief Justice *Tindal*, in giving judgment, explicitly so states. Lord *Langdale* next refers, in support of his conclusion, to *Davis* v. *Mason* (2), which, again, is a case not of unlimited but of limited restraint. Lord *Langdale* thus appears to miss the whole point of the common law classification, and treats the matter before him under the wrong category. It is to be observed, however, that *Whittaker* v. *Howe* (3) was merely a decision upon an application for an interlocutory injunction, and that Lord *Langdale* himself appears to have reserved the right to reconsider the matter at the hearing. "In the progress of the cause," he says, "it may become necessary to consider further the points which have been raised; but at present I am of opinion, that the right claimed by Mr. *Howe* to act in violation of the contract for which he has received the consideration is, to say the least, so far doubtful that he ought not to be permitted to take the law into his own hands." As Justice *Patteson* points out in *Nicholls* v. *Stretton* (4), the decision in *Whittaker* v. *Howe* cannot be reconciled with *Ward* v. *Byrne* (5), or, indeed, with the whole stream of common law authority.

In 1869 the case of the *Leather Cloth Company* v. *Lorsont* (6) occurred before Vice-Chancellor *James*. To the soundness of the actual decision in that case of the illustrious equity lawyer who tried it I have no objection to urge; but his language seems calculated in several passages to confuse and not to throw light upon our conceptions of the established common law doctrine. The Vice-Chancellor's expressions are at times coloured by the same kind of misapprehension of the common law as that which pervades the judgment of Lord *Langdale* in *Whittaker* v. *Howe*. The defendant in *Leather Cloth Company* v. *Lorsont* had sold to the plaintiff company certain letters patent for the manufacture of American leather cloth, together with all the processes of manufacture. He covenanted in return not to carry on in any

(1) 7 Bing. 743.
(2) 5 T. R. 118.
(3) 3 Beav. 383.
(4) 10 Q. B. 353.
(5) 5 M. & W. 548.
(6) Law Rep. 9 Eq. 345.

C. A. 1892 MAXIM NORDENFELT GUNS AND AMMUNITION COMPANY v. NORDENFELT. Bowen, L.J.

part of *Europe* the manufacture which was the subject of the patent, and not to communicate to any person or persons the means or processes of such manufacture, so as in any way to interfere with the exclusive enjoyment by the plaintiff company of the benefits agreed to be purchased. This was nothing but the sale of a secret process with a corresponding covenant not to use it or divulge it; and the sale, moreover, of a process which could not be used without being divulged. Sales of secret processes are not within the principle or the mischief of restraints of trade at all. By the very transaction in such cases the public gains on the one side what is lost on the other; and unless such a bargain was treated as outside the doctrine of general restraints of trade, there could be no sale at all of secret processes of manufacture. In order to justify such an obvious exception it was not necessary to deny the existence of the common law rule against general restraints of trade. Yet the Vice-Chancellor observes that a man may enter into any stipulation, however restrictive, provided that the restriction, in the judgment of the Court, is not unreasonable, having regard to the subject-matter of the contract. In so saying he apparently ignores the distinction that had been drawn for more than 250 years between general and partial restraints of trade. The test he suggests as the true one in all cases entirely leaves out of sight the interests of the public, on the consideration of which interests the rule against general restraint of trade is built. In *Allsopp* v. *Wheatcroft* (1872) (1), Vice-Chancellor *Wickens* restated and reaffirmed the common law doctrine as to general restraints of trade, and explained the decision in the *Leather Cloth Company* v. *Lorsont* (2) as an exception due to the character of the subject-matter.

Some years later, in *Rousillon* v. *Rousillon* (3), Lord Justice (then Mr. Justice) *Fry*, in one of the many striking and brilliant judgments for which the profession will long admire him, proclaimed his disbelief in the existence of the rule of the common law, and laid down the proposition that there is no absolute doctrine that a covenant in restraint of trade is void merely because it is unlimited in regard to space. The question in each

(1) Law Rep. 15 Eq. 59, 65. (2) Law Rep. 9 Eq. 345.
(3) 14 Ch. D. 351.

case, he held, was whether the restraint extended further than was necessary for the reasonable protection of the covenantee, and if it did not do so, the performance of the covenant would be enforced even though the restriction was unlimited as to space. This broad negation of the rule appears to me to destroy the distinction (illustrated at length in *Mitchel* v. *Reynolds* (1)), which always has subsisted between general and partial restraints of trade. In destroying it Lord Justice *Fry* appears to me to overlook the importance of the principle which underlies the entire doctrine of the unlawfulness of general restraints of trade —that the interests of the contracting parties are not necessarily the same as the interests of the commonwealth. Rules which rest upon the foundation of public policy, not being rules which belong to the fixed or customary law, are capable, on proper occasion, of expansion or modification. Circumstances may change and make a commercial practice expedient which formerly was mischievous to commerce. But it is one thing to say that an occasion has arisen upon which to adhere to the letter of the rule would be to neglect its spirit, and another to deny that the rule still exists. The *dicta* which Lord Justice *Fry* cites from *Hitchcock* v. *Coker* (2), from *Tallis* v. *Tallis* (3), and from *Mallan* v. *May* (4), are all *dicta* in cases of partial restraint, where the reasonableness of the particular contract necessarily came under consideration. The necessary protection of the individual may in such cases be the proper measure of the reasonableness of the bargain. When Lord Justice *Fry* passes on (5) to examine the question of the existence of the common law rule, he assumes, as it appears to me, without sufficient justification, that complete protection of the individual is the only reason which ought to lie at the root of the doctrine. But the reasonableness of the legal principle which forbids general restraint altogether is not the same thing as the reasonableness (as between the parties) of the bargain in any particular case. With regard to the argument that the rule, if it existed, would be an artificial one, and would therefore admit of no exceptions, the judgments

(1) 1 P. Wms. 181; 1 Sm. L. C. 9th Ed. p. 430.
(2) 6 A. & E. 348.
(3) 1 E. & B. 391.
(4) 11 M. & W. 653.
(5) 14 Ch. D. 366.

C. A. 1892 — MAXIM NORDENFELT GUNS AND AMMUNITION COMPANY v. NORDENFELT. — Bowen, L.J.

of the Judges and of the House of Lords in the case of *Egerton* v. *Earl Brownlow* (1), illustrate, I submit, the distinction between a fixed rule of customary law and a rule based on reason and policy. The latter may admit of exceptions, although the former may not. Nor does the Lord Justice, to my mind, sufficiently allow for the weight of a multitude of decided cases when he states that there are "undoubtedly cases in which it has been said that the restraint must not be universal," and illustrates this by reference to *Ward* v. *Byrne* (2), *Hinde* v. *Gray* (3), and *Allsopp* v. *Wheatcroft* (4). The entire history of the subject of restraint of trade proceeds surely on the basis of the existence of the rule in question. With *Whittaker* v. *Howe* (5) I have already dealt. *Jones* v. *Lees* (6) was, as I have pointed out, a case of partial restraint in respect of the mode of manufacture. "I consider," says Lord Justice *Fry* in conclusion (7), "that the cases, in which an unlimited prohibition has been spoken of as void, relate only to circumstances in which such a prohibition has been unreasonable." Is it not a truer view that the Courts have never, as a rule, even entered on the consideration of the circumstances of any particular case where the prohibition has been unlimited as to area? In *Davies* v. *Davies* (8), opposite opinions on the subject of the common law rule were expressed by Lord Justice *Cotton* and by Lord Justice *Fry*; but the matter did not call for decision.

The result seems to me to be as follows: General restraints, or, in other words, restraints wholly unlimited in area, are not, as a rule, permitted by the law, although the rule admits of exceptions. Partial restraints, or, in other words, restraints which involve only a limit of places at which, of persons with whom, or of modes in which, the trade is to be carried on, are valid when made for a good consideration, and where they do not extend further than is necessary for the reasonable protection of the covenantee. A limit in time does not, by itself, convert a general restraint into a partial one. "That which the law

(1) 4 H. L. C. 1.
(2) 5 M. & W. 548.
(3) 1 Scott, N. R. 123.
(4) Law Rep. 15 Eq. 59.
(5) 3 Beav. 383.
(6) 1 H. & N. 189.
(7) 14 Ch. D. 369.
(8) 36 Ch. D. 359.

does not allow is not to be tolerated because it is to last for a short time only." In considering, however, the reasonableness of a partial restraint, the time for which it is to be imposed may be a material element to consider.

Such, I think, is a *résumé* of the common law doctrine up to this day. I proceed now to consider, upon this view of the law, the appeal before us. The facts relating to the incorporation of the Plaintiff company have been sufficiently stated by my Brother *Lindley*. By an agreement dated the 5th of March, 1886, Mr. *Nordenfelt* had agreed to sell to the old *Nordenfelt Company* all the goodwill of one of his businesses, with the land, stock, plant, and machinery, patents, and other property connected with it, for the sum of £287,500 (£237,500 of which was to be in cash, and £50,000 in fully paid-up shares); and on the transfer of that business to the Plaintiff company he agreed with the Plaintiff company, by an agreement dated the 12th of September, 1888, that for seven years he was to be the managing director at a salary and commission. He covenanted that he would not, during the term of twenty-five years from the date of the incorporation of the company, if the company should so long continue to carry on business, engage, either directly or indirectly, in the trade of a manufacturer of guns or ammunition, or in any business competing or liable to compete in any way with that for the time being carried on by the company. This restriction was not to apply to explosives other than gunpowder, to submarine boats or torpedoes, or to castings or forgings of steel, and some other manufactures. It was further provided that Mr. *Nordenfelt* was not to be released from this restriction by the company ceasing to carry on business merely for the purpose of reconstitution, or with the view to the transfer of its business to another company, so long as such other company was to continue carrying on the same. Mr. *Nordenfelt* received the consideration, acted for a while as the managing director of the new company, but now seeks to break the covenant in question, and asserts his right so to do on the ground that it is void in law as contrary to the principle which prohibits general restraint of trade. The business of the new company includes, as a fact, other things besides guns and ammunition; and it was urged on

C. A. 1892 — MAXIM NORDENFELT GUNS AND AMMUNITION COMPANY v. NORDENFELT. — Bowen, L.J.

this ground, among others, that the covenant which restrained Mr. *Nordenfelt* from all competition, in any aspect of the case was too large to be reasonable. In my opinion the different parts of the covenant are really capable of being separated from each other. The present breach relates to one portion only, and the covenant, even if it were invalid as to the rest, might, I think, nevertheless, be binding as to part.

The real question in respect of which the action is brought was, as we were informed, a threat by Mr. *Nordenfelt* to engage abroad in the sale or manufacture of guns and ammunition. The case thus raised is a new and unprecedented one. Mr. *Nordenfelt's* old business did not, broadly speaking, consist in the supply of commodities to any English city or district, nor of any article intended for English consumption or use at all. He may have at times, for anything we know, supplied the English Government with some materials for war; but his trade consisted in manufacturing and selling guns and ammunition for the use and benefit of the foreign world, or of the middlemen and agents who negotiate orders for foreign exportation. The area over which he might distribute his guns or ammunition was a foreign one, unlimited in geographical space, no doubt; but it must be remembered that the governments or bodies who require to use guns and materials of war are capable of approximate enumeration. A covenant in restraint of trade made by such a person as the Defendant with a company he really assists in creating to take over his trade, differs widely from the covenants made in the days of Queen *Elizabeth* by the traders and merchants of the then English towns and country places. When we turn from the homely usages out of which the doctrine of *Mitchel* v. *Reynolds* (1) sprang, to the central trade of the few great undertakings which supply war material to the executives of the world, we appear to pass into a different atmosphere from that of *Mitchel* v. *Reynolds*. To apply to such transactions as the present the rule that was invented centuries ago in order to discourage the oppression of English traders, and to prevent monopolies in this country, seems to be the bringing into play of an old-fashioned instrument. In regard, indeed, of all industry, a great change

(1) 1 P. Wms. 181; 1 Sm. L. C. 9th Ed. p. 430.

has taken place in *England*. Railways and steamships, postal communication, telegraphs, and advertisements, have centralized business and altered the entire aspect of local restraints on trade. The ancient rules, however, still exist; it is desirable that they should be understood to remain in force, but great care is evidently necessary not to force them upon transactions which, if the meaning of the rule is to be observed, ought really to be exceptions.

"The determinat f what is contrary to the so-called 'policy of the law the Privy Council in *Evanturel* v. *Evanturel* (1)—" ly varies from time to time. Many transactions are now by our own Courts which a former generation wo e avoided as contrary to the supposed policy of the he rule remains, but its application varies with the r s which for the time being guide public opinion." ssage from the judgment of the Privy Council appears nadow exactly the problem we have in the present o solve. Is this case one which falls within the rule general restraint of trade, or ought it to be an exce Exceptions to rules which are not "artificial," but ba eason and public policy, ought themselves to be i in which to apply the letter of the rule would be te its true meaning, and in which the very reason on the rule is based militates in favour of the exception. nstance of an exception to the rule which discourages eral restraints of trade is admitted to exist in respect of the signment of trade secrets; and it may here be useful again to llude to the ground upon which such dispositions of property are excluded from the operation of the ordinary doctrine. In the case of the assignment of a trade secret there arises a conflict between two ideas, both of which are developments in opposite directions of the larger principle that English industry and trade ought to be left free. The first of the two seemingly antagonistic corollaries to which this larger principle leads, is the maxim that no one should be allowed to contract himself out of his liberty to trade. The second, which appears to conflict with the first, is that every man should be at liberty to sell the

(1) Law Rep. 6 P. C. 1, 29.

C. A. 1892. MAXIM NORDENFELT GUNS AND AMMUNITION COMPANY v. NORDENFELT. Bowen, L.J.

goodwill of his trade on any terms that are neither oppressive to himself nor injurious to the State.

These two antinomies are well contrasted by Vice-Chancellor *James* in *Leather Cloth Company* v. *Lorsont* (1). The history, indeed, of the entire doctrine as to restraint in trade is itself nothing but a narrative of the continual efforts of the English law, amidst all the changing conditions of English industry and commerce, to adjust and harmonize these two opposite points of view. It has been in the process of such gradual adjustment that the more indulgent law as to partial restraint of trade has been evolved. The laxer rule as to partial restraint is thus itself an exception, the definition of which again expanded from time to time as society required it. The law as to trade secrets, like the law of partial restraint, is an exception too. Before the manufacturer or trader sells his trade secret he is the sole possessor of it. If he is to sell it to advantage, he must of necessity be able to undertake not to retain the right to use it or to communicate it to others. A covenant that he will not destroy the value of that which he himself is handing over causes, in such a case, no diminution in the supply of commodities to the world, but tends, in nine cases out of ten, to stimulate it. There is no tendency in such a transaction to create a monopoly, for the monopoly existed *ex hypothesi* already. Trade cannot suffer by the substitution of one possessor of a secret for another. The analogy between the sale of a trade secret and the sale or transfer of a goodwill of such a business as Mr. *Nordenfelt's* is not, of course, exact, but there is a strong similarity between the two cases. Mr. *Nordenfelt* has assisted in creating the Plaintiff company to take over what really had been his own business. It never could have been called into existence as a substantial undertaking if he had not been willing to retire in the company's favour from the whole field of competition. He obtained ample consideration for what he gave. But he also retained (as ought not to be forgotten) the right still to continue trading in a substantial portion of his old manufacture—torpedoes, submarine boats, explosives other than gunpowder, and other matters.

So much as to the reasonableness of the agreement itself

(1) Law Rep. 9 Eq. 345.

But it still remains to be considered whether such an agreement can be calculated to injure the public. It seems to me that it would almost amount to legal pedantry if Courts of Law were to discover in Mr. *Nordenfelt's* covenant the elements of danger to the commonwealth. He agreed to disappear from the number of those who make guns and ammunition for other countries. How can the British public possibly be inconvenienced by this? He ceases, it may be said, to employ English labour so far as his manufacture of guns and ammunition is concerned. But he only does so in order to enable a thriving company to take his place, at the disposal of which he was to place for a time his services; and the restriction on himself to which he has consented will only last while his place in the trade is actively filled by the company or the successors to whom in turn it may resell the goodwill. So far as he might have had occasion to supply the English Government with guns or ammunition, this company can act in his stead; although out of his liberty to do so, if he desires it, he cannot in law contract himself, nor is his agreement to be read as imposing any such invalid or possibly illegal stipulation. Can it then be said that a contract by which he consents to the transfer of the business of making guns and ammunition for foreign lands to an English company, with whom he undertakes not to compete so long as the old trade is flourishing in their hands, is against the policy of English law? So to hold would surely be to reduce to an absurdity the law of restraint of trade. I answer the question in the words of Lord *Nottingham* in the *Duke of Norfolk's Case* (1): "Pray let us so resolve cases here, that they may stand with the reason of mankind, when they are debated abroad."

For the purpose of clearness I will, in conclusion, attempt to summarize the exact ground on which I consider this case should be decided. The rule as to general restraint of trade ought not, in my judgment, to apply where a trader or manufacturer finds it necessary, for the advantageous transfer of the goodwill of a business in which he is so interested, and for the adequate protection of those who buy it, to covenant that he will retire altogether from the trade which is being disposed of, provided

(1) 3 Ch. Cas. 33.

C. A. 1892

MAXIM NORDENFELT GUNS AND AMMUNITION COMPANY v. NORDENFELT.

Bowen, L.J.

always that the covenant is one the tendency of which is not injurious to the public. This last element in the definition ought not, I think, to be overlooked, for I can conceive cases in which the absolute restraint might, as between the parties, be reasonable, but yet might tend directly to injure the public; and a rule founded on public policy does not admit of any exception that would really produce public mischief; such might be possibly the case if it was calculated to create a pernicious monopoly in articles for English use—a point I desire to leave open, and one which, having regard to the growth of syndicates and trusts, may some day or other become extremely important.

As good faith demands that Mr. *Nordenfelt* should be bound by his solemn agreement, and as the public can in no way be injured by his being held to it, I think the injunction as defined by my Brother *Lindley* should be granted, and the order made in the form he has suggested.

A. L. SMITH, L.J.:—

The question for determination is whether, when it is sought to enforce a covenant in restraint of trade, made upon good consideration, which is unlimited as regards space, but is limited in some other way, such as to the persons with whom the covenantor is to trade, or as to the business which he is prohibited from carrying on, the Court is to declare the covenant *ipso facto* void, or is to ascertain whether, in the circumstances of the case, the restraint imposed is reasonable or not. [His Lordship, having shortly stated the facts, and read the restrictive covenant (clause 2) in the agreement of the 12th of September, 1888, proceeded:—]

It is for breach of this covenant that this action is brought, and it is admitted that the Defendant has broken it by entering into a contract of the 16th of September, 1890, with a foreign company—viz., the *Société Cockerill*, carrying on business in *Belgium*.

I am of opinion that that portion of the covenant which restrained the Defendant from carrying on any business whatever competing, or liable to compete, in any way with that for the time being carried on by the company, is severable from the

rest, on the principle of *Mallan* v. *May* (1), *Price* v. *Green* (2), and many other cases since.

This is not, therefore, a covenant, as Mr. Justice *Romer* apparently at one time thought, void by reason of its preventing the Defendant from carrying on all the businesses mentioned in the articles of association of the Plaintiff company. This covenant, as it will be seen, is expressly limited to one only of the classes of business in which the Defendant was skilled. It left open to him to trade when and where he pleased in all the numerous nitro-glycerine powders and explosives, including dynamite, also in torpedoes, castings or forgings of steel or iron, or alloys of iron or copper—obviously a very large area in which to carry on business.

It is unnecessary to determine the point which gave rise to the difference of opinion between Lord Justice *Cotton* and Lord Justice *Fry* in *Davies* v. *Davies* (3), whether, in the case of a covenant in general restraint of trade which is absolute and unlimited, the Court is or is not to ascertain if the covenant is reasonable under the circumstances, as Lord Justice *Fry* thought, or if it is *ipso facto* void, as being against public policy, as was the opinion of Lord Justice *Cotton*, for this point does not arise; but I must say that I incline to the opinion that a covenant by a man never again to trade anywhere in anything with anybody is *ipso facto* void, as being against public policy, and that it is too late to question the law as to this, even if it were desired to do so.

In this case the covenant, though unlimited as to space, is limited as the subject-matter of the restraint.

It was argued by the Solicitor-General for the Defendant that if, in fact, the covenant be unlimited as regards space, it mattered not how much or how little of the covenantor's trading was restrained, and he asserted that the covenant was *ipso facto* void, and he cited cases, and especially the cases of *Ward* v. *Byrne* (4)—where the restraint was absolute for nine months, and, being unlimited as to space, was held bad—and *Allsopp* v. *Wheatcroft* (5),

(1) 11 M. & W. 653.
(2) 16 M. & W. 346.
(3) 36 Ch. D. 359.
(4) 5 M. & W. 548.
(5) Law Rep. 15 Eq. 59.

C. A. 1892 — MAXIM NORDENFELT GUNS AND AMMUNITION COMPANY v. NORDENFELT. — A. L. Smith, L.J.

where Vice-Chancellor *Wickens* thought that there was a recognised rule as to the necessity of a limitation of space to render a covenant valid, dissenting from the opinion of Vice-Chancellor *James* in *Leather Cloth Company* v. *Lorsont* (1). The whole of the cases have been dealt with, either in the masterly judgment of Mr. Justice *Fry* in *Rousillon* v. *Rousillon* (1880) (2), or by Lord Justice *Bowen* in his judgment just delivered. Over fifty years ago Lord *Langdale* held, in *Whittaker* v. *Howe* (3), that a covenant restraining a solicitor from practising in any part of *Great Britain* for a period of twenty years should be enforced. I do not stop to inquire whether the case was rightly decided, but I cite it as, I believe, it is one of the first cases, if not the first, in which a covenant was held to be good with no limit as to space.

In the case of *Leather Cloth Company* v. *Lorsont* (1869), Vice-Chancellor *James* held that a covenant restraining trading throughout the *United Kingdom* was not, upon the face of it, necessarily bad; and he stated that he did not read the cases as having laid down any such irrebuttable presumption.

Lord Justice (then Mr. Justice) *Fry*, in *Rousillon* v. *Rousillon*, held the same, though he went further; and Mr. Justice *Chitty*, in the case of *Badische Anilin und Soda Fabrik* v. *Schott* (4), also held that a covenant unlimited as to space was, in that case, valid.

It is true that Lord Justice *Cotton*, in one part of his judgment in *Davies* v. *Davies* (5), approved of the decision in *Allsopp* v. *Wheatcroft* (6); but he says (7) that the case of *Hitchcock* v. *Coker* (1837) (8), "I think introduced what I may here mention, that undoubtedly now, if a covenant is in any way limited, either sufficiently as regards space, or sufficiently as regards time, then it will not be considered as an absolute restraint of trade, but only a limited restraint, and then the question as to whether that limit is reasonable will come into consideration." Lord Justice *Cotton* did not deal with a covenant partial in itself as regards

(1) Law Rep. 9 Eq. 345.
(2) 14 Ch. D. 351.
(3) 3 Beav. 383.
(4) [1892] 3 Ch. 447.
(5) 36 Ch. D. 359.
(6) Law Rep. 15 Eq. 59.
(7) 36 Ch. D. 383.
(8) 6 A. & E. 438.

the subject-matter of the restraint; but the learned Lord Justice appears to me to have thought that a covenant which was only in partial restraint of trade was not void merely because it was unlimited as to space.

Lord Justice *Bowen* has fully discussed the question whether a limit as to time converts a covenant which is in general restraint of trade into a covenant in partial restraint of trade; and I agree, not only in his remarks, but in the conclusion he has arrived at thereon.

The Judges who took part in the above-mentioned cases appear to have thought that a non-limit as to space was not, in all cases, of itself fatal to a covenant in restraint of trade.

I may point out that one of the grounds given by Lord *Macclesfield* in his well-known judgment in *Mitchel* v. *Reynolds* (1), why covenants in general restraint of trade were void, and which especially applies to a covenant unlimited in point of space, has, in my opinion, no application at the present day. He says that covenants in general restraint throughout the kingdom must be void, being only oppressive to the obligor and of no benefit to the obligee, "for what does it signify to a tradesman in *London*, what another does in *Newcastle*?" That may have been a good reason in 1711; but it certainly is not so at the present day.

I now come to some of the cases in which, the subject-matter of the covenant being only a partial restraint of trade, such covenants have been held to be good, though unlimited in any other way. In *Gale* v. *Reed* (1806) (2), the plaintiffs sued the defendant for breach of a covenant for not, during his lifetime, employing exclusively the plaintiffs to make all the cordage ordered of the defendant by his friends and connections whom the plaintiffs could trust. It was held that, inasmuch as the defendant had only covenanted to employ the plaintiffs to make cordage for those of the defendant's friends whom the plaintiffs could trust, this was only a partial restraint of trade, for the defendant could supply those whom the plaintiffs did not think fit to trust, and that, consequently, this covenant was valid.

The case of *Young* v. *Timmins* (1831) (3) is an exemplification

(1) 1 P. Wms. 181. (2) 8 East, 80.
(3) 1 Tyrw. 226.

C. A. 1892 MAXIM NORDENFELT GUNS AND AMMUNITION COMPANY v. NORDENFELT. A. L. Smith, L.J.

of a covenant being held good as being only in partial restraint of trade where the covenantor covenants to work for one master to the exclusion of all others.

So, in *Wallis* v. *Day* (1837) (1), a man for good consideration covenanted that he would not during his life exercise his trade of a carrier except as the assistant carrier of *A. B.* The Court held the covenant good upon the ground that it was not an absolute, but a partial restraint; for the man was not restrained during his life from serving *A. B.*; he was only restrained from serving any one else.

In *Jones* v. *Lees* (2), the plaintiff, a patentee of improvements in spinning machines, bound the defendant to use his patent during the term of the patent; and the defendant covenanted with the plaintiff not to make or sell any machines without the plaintiff's invention being used therein. The Court held that, inasmuch as the restraint was partial as to the mode of exercising the trade, although total as to space, the covenant was valid.

In the case of *Mills* v. *Dunham* (3), this Court held that a covenant not to transact business, after leaving an employer, similar to the business transacted by the employer, was valid, it being only a partial restraint, and this although there was no other limit in the case.

These cases shew that a covenant in partial restraint of trade, whether as to the person with whom the covenantor is to trade, or as to the business which he is prohibited from carrying on, may be good, although unlimited as to space. In my judgment there is no such hard-and-fast rule as is contended for—viz., that every covenant in restraint of trade is *ipso facto* void if it is unlimited as to space. On the contrary, in my judgment a covenant which is but a partial restraint of trade will be good, though unlimited as to space, if, in the circumstances of the particular case to which it is applied, the covenant is reasonable and not to the detriment of the public.

The Court has, therefore, to determine whether the covenant in question, under the circumstances existing in this case, is an

(1) 2 M. & W. 273. (2) 1 H. & N. 189.
(3) [1891] 1 Ch. 576.

unreasonable restraint of trade, applying the well-recognised rule as to reasonableness; for, if the covenant be reasonable, it ought to be enforced. This question of reasonableness, though an inference to be drawn from existing facts, has ever been held to be a matter of law. The rule to be applied has long since been settled by the cases of *Horner* v. *Graves* (1) and *Hitchcock* v. *Coker* (2), in the Exchequer Chamber, and acted upon. It is this: Where the restraint is such as only to afford a fair protection to the interests of the party in favour of whom it is given, and not so large as to interfere with the interests of the public, then the covenant is not unreasonable.

Now arise these questions: first, are the limits of time and space in the covenant sued on reasonable for the protection of the covenantee? Secondly, is the covenant so large as to interfere with the interests of the public? It is argued that, as the Defendant was forty-six years of age when he entered into the covenant, a twenty-five years' restriction would probably continue during his lifetime; and it was suggested that it was no limit at all, was wholly unreasonable, and merely delusive. I do not agree with these suggestions. It will be remembered that, if the Plaintiffs and their successors cease to trade, the restraint comes to an end. The £287,500, which the Plaintiffs or their predecessors paid to the Defendant for the business, must obviously take many years before it can be recouped by trading; and why am I to hold that twenty-five years is more than a fair protection to the Plaintiffs? No facts have been given in evidence from which I can draw such an inference. Indeed, what facts have been proved tend in the contrary direction. In considering this, it does not seem to me that the age of the covenantor is the matter to be considered, but what is the fair protection to the covenantee; and I may say that my own opinion is that, if the limit here had been the covenantor's life, in the special circumstances of the case, it would not have been unreasonable.

Now, as to the limit of space. The Plaintiffs' business is world-wide; there is hardly a place of note in any quarter of the globe into which they do not carry on business, and,

(1) 7 Bing. 735. (2) 6 A. & E. 438.

C. A. 1892 MAXIM NORDENFELT GUNS AND AMMUNITION COMPANY v. NORDENFELT. A. L. Smith, L.J.

consequently, from which competition may not arise. How can it be truly said that a restraint which is but co-extensive with the area traded over by the Plaintiffs is unreasonable, and affords more than a fair protection to their interests? In my judgment, the limit of space in all these cases must necessarily vary with the ever-changing circumstances attending the development of trade, and the varying circumstances of the particular trader; and, bearing in mind what the Plaintiffs' trade is, the limit, though co-extensive with the world, is not, in my opinion, unreasonable. In my judgment, the limits of time and space in this particular case are no more than to afford a fair protection to the Plaintiffs.

Now, as to public policy. Of the many reasons given by Lord *Macclesfield* in *Mitchel* v. *Reynolds* (1) as to why a covenant in restraint of trade was void as being against public policy, at the present time by far the most cogent, if not the only, ones still extant are, first, that a man may not be prevented from working at his trade and thus become destitute; and, secondly, that the State has an interest in the producing power of its members. Where a man is left, not only with such an area wherein to trade and to continue to earn his living, but is also placed in possession of between £200,000 and £300,000, as the Defendant in this case is, and the public are not deprived of the trade theretofore carried on by the covenantor, I cannot myself see how, as a matter of fact, either of the above-mentioned public policies are trenched upon; and I think they are not. I entirely agree with what was said by Sir *George Jessel* in the *Printing and Numerical Registering Company* v. *Sampson* (2), that there is, at any rate, another public policy which he called "paramount," viz., that "men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by Courts of Justice."

How are the interests of the public interfered with? They have a company producing in *England* what the Defendant otherwise might have produced, and probably as efficiently as the Defendant would have done; and they have also a man (the

(1) 1 P. Wms. 181. (2) Law Rep. 19 Eq. 462, 465.

Defendant) equipped with a very large sum of money wherewith to carry on the numerous trades which are left in his uncontrolled possession. In my judgment, the interests of the public are certainly not interfered with, at least to their detriment, and the point of public policy does not avail the Defendant.

For these reasons, I am of opinion that the covenant should be enforced; that the appeal must be allowed, and the relief, as framed by Lord Justice *Lindley*, granted.

Solicitors: *Wilson, Bristows, & Carpmael; Munns & Longden.*

G. I. F. C.

STIRLING, J.

1892

Dec. 16.

ATTORNEY-GENERAL *v.* MOORE.

[1892 A. 1804.]

Treasure Trove— Crown — Prerogative — Coroner — Inquest — Jurisdiction— Inquiry "who were the Finders and who is suspected thereof"—Inquiry as to Title—Coroners Act, 1887 (50 & 51 *Vict. c.* 71), *s.* 36.

The jurisdiction of the coroner with reference to treasure trove is limited to an inquiry "who were the finders and who is suspected thereof." He has no jurisdiction to inquire into any question of title to the treasure as between the Crown and any other claimant, the title of the Crown to all treasure trove being independent of any finding of the coroner's jury.

MOTION.

On the 16th of December, 1891, certain articles, consisting of ancient silver plate, were found buried in the earth upon a farm at *Stoke Prior*, in *Herefordshire*, which was in the occupation of one *Godfrey*. The articles were discovered by *Godfrey's* son, and a farm labourer named *Strangward*, while engaged in ferreting for rabbits. They comprised three cups, one chalice, two pyxes, and one paten, all of silver, weighing altogether about fifty ounces, and being worth, as ancient silver, about £70 or £80.

Upon being informed of the discovery, the Defendant, who was the coroner for the *Leominster* district of the county, obtained possession of the treasure, and proceeded to hold an inquest upon it, before a jury summoned for the purpose. At this inquest the jury unanimously found that the articles were treasure trove; but a claim to the possession of them was put forward on behalf of the lord of the manor, Mr. *J. H. Arkwright*. He claimed to be entitled to the treasure trove under a deed of grant of royalties dated in 1620 and executed by *James* I. to the Marquis of *Buckingham*, a predecessor in title of the Defendant *Arkwright*. Upon the question of the title to the treasure trove, the jury failed to agree, and were bound over by the coroner, acting under sect. 4, sub-sect. 5, of the *Coroners Act*, 1887, to attend the next assizes.

On the 5th of the December, 1892, the matter came before Mr. Justice *Day* at the *Hereford* Assizes, when all the jury were

in attendance except one, who was absent through illness. Under those circumstances Mr. Justice *Day* discharged the jury. Counsel for the Crown then asked the Judge to direct the coroner to record the verdict of treasure trove upon the inquisition. Mr. Justice *Day* declined to give such direction, and said: "I have come to the conclusion that the inquiry is not yet complete. Whether it is or not, I have no jurisdiction here to compel the coroner to do one thing or another, and I do not hesitate, as the question has been raised publicly, to express my very decided opinion that the coroner has been quite justified in the conduct of his proceedings throughout. I say this, without hearing the arguments, that the finding that this is treasure trove does not conclude the inquiry. The coroner is a very ancient and most responsible officer of the Crown, and he has to inquire amongst other things into the dues of the Crown, and, if I may so express it, into the falling-in of the rights of the Crown. The Crown is not absolutely entitled to treasure trove. The Crown originally was entitled to all treasure trove—and it is now *primâ facie* entitled to it; but the Crown has in very many instances parted with that right by granting it to a subject. In such cases the Crown cannot seize chattels because they are treasure trove, and the coroner is bound to inquire into the matter and deal with it. If the Crown has parted with its rights the treasure trove ceases to be treasure trove, in the ordinary sense, as belonging to the Crown. I have no doubt, when one has regard to the little authority there is—and it seems to me there is exceedingly little—and having regard to the history of the matter, and to the very principles which are involved in it, the coroner has merely to inquire into the rights of the Crown. The course adopted by the coroner was the most convenient one in practice, because, if with the mere finding, without considering any claims which may be made, the coroner has to hand over the treasure to the Crown, the subject would have no right whatever except the extremely precarious one of presenting a petition of right, and with the amended state of the law a petition of right is a very inconvenient course of proceeding. If the coroner is wrong, the simple remedy is to quash the inquisition."

STIRLING, J.

1892

ATTORNEY-GENERAL v. MOORE.

STIRLING, J. 1892 ATTORNEY-GENERAL v. MOORE.

The coroner then gave notice to the Crown of his intention to hold a fresh inquest; and upon that the Crown commenced this action for delivery up of the treasure, and gave notice of motion that the Defendant *Moore* might be ordered forthwith to deposit the treasure in Court, or otherwise that he might be restrained by injunction until the trial of the action, or further order, from delivering, parting with, or in any manner disposing of any of the articles to any person or persons other than the Lords Commissioners of Her Majesty's Treasury.

The motion now came on to be heard.

Sir. *J. Rigby*, S.G., and *Ingle Joyce*, for the Crown :—

The jurisdiction of the coroner is limited to inquiring who were the finders of the treasure trove and who is suspected thereof; he has no right to go beyond that, and institute an inquiry into the title. It is settled law that a grant of royalties or franchises does not cover those things which are in the Crown by virtue of its high prerogative, and in the deed set up by the lord of the manor there is no grant of treasure trove at all. Mr. Justice *Day* is reported to have said at the assizes that it was the duty of the coroner to go into the title. That, we say, is wrong, and it is desired to have the question of principle determined in order to prevent the necessity of any further question arising. Upon the authorities there is no question that the right of the Crown to treasure trove vests absolutely, and quite independently of any coroner's inquest. No doubt, in the case of a prosecution for concealment of treasure trove, it may be desirable, and has been the practice, to hold a coroner's inquest; but in all other cases such a thing is now unknown. The practice is for the finders to bring the treasure trove to the Treasury, and for the Treasury Commissioners to make such arrangements as they shall think fit. The jurisdiction of the coroner is thus defined by the statute 4 Edw. 1, s. 2: "A coroner . . . . shall go where treasure is said to be found, and shall forthwith command four of the next towns, or five or six, to appear before him in such a place . . . . A coroner also ought to inquire of treasure that is found, who were the finders, and likewise who is suspected thereof." That jurisdiction is preserved by sect. 36 of the *Coroners Act*, 1887, in

these terms: "A coroner shall continue as heretofore to have jurisdiction to inquire of treasure that is found, who were the finders, and who is suspected thereof."

Any question of title, therefore, is entirely outside his functions. There is no trace anywhere of a coroner having a right to sit as a judge, and to charge a jury on questions of law as to the ownership of treasure trove. He has a right to inquire who is suspected, and as incidental to that right he may put upon his findings, with a view to criminal proceedings, a *primâ facie* finding of right. But here there is no suggestion of a probability of any criminal charge.

The authorities do not shew any jurisdiction in the coroner beyond what is conferred upon him by the provisions of the Acts —viz., the right to hold an inquiry "who are the finders of the treasure trove, and who is suspected thereof": *Bracton*, De Corona (1); *Britton* (2); *Dalton* on the Office of the Sheriff (1623) (3). The only suggestion that can anywhere be found that the coroner has power to determine questions of title to treasure trove appears in *Umfreville* on the Office and Duty of Coroners (1761) (4). In the case there mentioned there was no doubt a *primâ facie* finding as to the ownership of certain treasure trove; but there, there was a charge of concealment, and the finding as to title was only inserted in order to lead up to the finding that the person charged with the offence had concealed the treasure from the supposed owner.

But, besides these older authorities, there is modern authority of some importance upon this question. Formerly there was a distinction between chattels and lands belonging to the Crown. Until the recent statute, before the Crown could grant lands it was necessary that there should be an inquest, the Crown being expressly forbidden by statutes of *Henry* VI. (8 Hen. 6, c. 16; 18 Hen. 6, c. 6) to grant out lands until inquest had been found; and although a modern statute enacts that the lands shall vest in the Crown without office found, yet where it is still intended to deal with the lands, it is necessary to have an inquest; but that was never the law with regard to chattels.

(1) Lib. iii. Chap. vi. fol. 122.
(2) Chap. ii. pp. 8, 18, 66.
(3) Page 37.
(4) Page 536.

STIRLING, J. 1892 ATTORNEY-GENERAL v. MOORE.

There is a marked difference between lands and chattels personal as to the royal title. In *Chitty* on Prerogative (1), the general law is thus stated: "As to personalty, the general rule seems to be, that the king is entitled, without office or other matter of record: as in the case of goods and *choses in action* of felons, wreck of the sea, treasure trove, &c."

In *Britton* v. *Cole* (2), it was held "that by bare outlawry the party immediately forfeits his personal goods, and they are vested in the king, and he does not forfeit the profits of his lands, nor chattels real, till inquisition taken"; and the same law is laid down in *Viner* (3). *Reg.* v. *Mason* (4) may also be referred to. Again, in *Lambert* v. *Taylor* (5), the king had by his sign manual made over to the plaintiff a promissory note which had belonged to a person who had been found *felo de se* by a coroner's jury, and there was afterwards another inquisition *ad melius inquirendum*, and the question was whether the plaintiff who sued upon the note was bound to put in that inquisition. It was held that he was not, because it was an office of instruction only, and not of entitling; the title of the Crown having accrued by the felony under the coroner's inquisition. *Abbott*, C.J. (6), says: "The title of the Crown accrued by the finding of the felony under the first, that is, the coroner's inquisition." So in the case of a convicted felon, under the old law all his goods vested at once in the Crown, and the Crown could at once deal with them by order under the sign manual, and any plaintiff claiming under a grant from the Crown could sue without any inquisition of any kind. In *Reg.* v. *Toole* (7), which was a most important case, it was held that on indictment for concealing treasure trove it is not necessary to allege any inquisition or office found even in criminal proceedings. All the authorities are summed up there, and Chief Baron *Pigot* says: "It seems to me difficult to conceive why the forfeited goods and *choses in action* of a felon should become vested in the Crown immediately upon the forfeiture, and treasure trove should not be similarly

(1) Page 259.
(2) 1 Salk. 395.
(3) Tit. Treasure Trove, pl. 12.
(4) 2 Salk. 447.
(5) 4 B. & C. 138.
(6) Ibid. 150.
(7) 16 W. R. 439, 440; I. R. 2 C. L. 36, 42.

vested immediately upon the finding." And it was so decided that, without any inquest at all, a man could be indicted for concealing treasure trove.

The gist of the judgment in that case is that the treasure trove vested in the Crown immediately on the finding, without any necessity for any inquisition at all.

The same rule has been laid down as to wreck and other things of that sort.

It is not disputed that the property in question in this case is treasure trove, and that being so we submit that it vests in the Crown, and that there is no necessity for any further inquest by the coroner. The title which is set up by the lord of the manor depends upon written documents, and the coroner can have no jurisdiction to interpret them.

The only authority against our contention consists of certain remarks made by Mr. Justice *Day* at the assizes; but we submit that the learned judge did not intend to express any judicial opinion upon the question, and that what he said does not amount to more than a mere *obiter dictum*.

It would be a serious thing if this sort of contest were to arise in every case of treasure trove. The result would be that neither the finder nor the Crown would get anything.

We do not seek to interfere with the coroner if he chooses to hold another inquest, although we say it would be useless; but we desire to have the articles protected by being brought into Court, until the title of the Crown can be tried.

Even if the inquest were held, the utmost that could be done would be to treat the finding of the jury as *primâ facie* evidence. It would be traversable by any person whether collaterally interested or not: *Garnett* v. *Ferrand* (1); *Rex* v. *Aldenham* (2); *Holland* v. *Ellis* (3); *The Prince of Wales Assurance Company* v. *Palmer* (4).

The articles ought to be kept *in medio* until the title to them has been determined by this Court, which has complete jurisdiction to try it independently of the coroner.

(1) 6 B. & C. 611.
(2) 2 Lev. 152.
(3) 1 Vent. 278.
(4) 25 Beav. 605.

STIRLING, J. 1892 ATTORNEY-GENERAL v. MOORE.

Corner, for the coroner :—

The coroner has no personal interest in this matter, and is only anxious to do what he considers to be his duty. At present there has been no finding by the jury, and the coroner cannot hold his inquest without having possession of the plate in question.

[STIRLING, J. :—I shall not interfere with the coroner in the performance of what he considers to be his duty. All that I am asked to do is to keep the articles *in medio*.]

The coroner will undertake not to part with them until further order.

A. J. David, for the lord of the manor :—

I do not object to the articles remaining in the hands of the coroner until a court of competent jurisdiction shall otherwise direct.

STIRLING, J. :—

Having regard to the turn the matter has taken, it is not necessary for me to make a formal order; but I will say a few words in order to explain the ground upon which I proceed.

This action is brought by Her Majesty's Attorney-General against the coroner for the *Leominster* division of the county of *Hereford*, and the circumstances are somewhat peculiar. It appears that the articles mentioned in the notice of motion were found concealed in the earth, that the finders took them to the coroner, and that the coroner now has them in his possession. An inquest has been held, but the proceedings have proved abortive. There appears to have been no question that the articles in question are treasure trove. The jury, as I understand, were willing so to find; but the coroner desired that the inquiry should be prosecuted further, and that the title to those articles should be found by the jury. The jury were unable to agree. The matter, in pursuance of the *Coroners Act*, was adjourned to the assizes. It came before Mr. Justice *Day*, who discharged the jury. Therefore, there has been no finding as yet in the matter, and it is proposed by the coroner to hold a further inquest. With that I am not asked to interfere, and

I conceive it to be no part of my duty to interfere. But having regard to certain observations which are reported to have been made by the learned Judge, I desire to refer to one or two of the authorities on the subject. First of all, I refer to *Chitty* on the Prerogative (1) where treasure trove is thus defined: "Treasure trove, is where any gold or silver in coin, plate, or bullion is found concealed in a house, or in the earth, or other private place, the owner thereof being unknown, in which case the treasure belongs to the king or his grantee, having the franchise of treasure trove." Now, there is no question at all at the present moment that a *primâ facie* case of treasure trove has been made out. *Primâ facie* the title to the treasure trove is in the Crown; but no doubt that title may be displaced by producing a grant to a subject of the franchise of treasure trove. But the question between the Crown and the subject must be decided by an interpretation of the grant, and I cannot conceive that it is possible that that title can be decided either by the coroner or by the verdict of the coroner's jury. It does not seem to me that it falls within the jurisdiction of the coroner in cases of this kind to determine that title under sect. 36 of the Act of 1887. That section says: "A coroner shall continue as heretofore to have jurisdiction to inquire of treasure that is found, who were the finders, and who is suspected thereof." The jurisdiction of the coroner, therefore, is limited to an inquiry who were the finders and who is suspected thereof. I do not see, as at present advised, that he has any jurisdiction to determine the title. No doubt he may have incidentally to refer to the title, as was the case in the case in which the verdict of the jury is set out in *Umfreville* on the Office and Duty of Coroners (2); but I think it is not according to law, that the title can be determined by the coroner. That being so, I further think that according to the authorities the title of the Crown is independent of the finding of the jury. In *Chitty* on the Prerogative (3), the law is stated thus: "As to personalty, the general rule seems to be, that the king is entitled, without office or other matter of record: as in case of goods and *choses in action* of felons, wreck of the sea, treasure

(1) Page 152. (2) Page 536. (3) Page 259.

STIRLING, J. 1892 ATTORNEY-GENERAL v. MOORE.

trove, or the profits of lands of clerks, &c., convicted of felony, or of persons outlawed in a personal action"; and the learned author goes on to cite a passage from *Blackstone's* Commentaries (1) which is to this effect: "The inquests of office still remain in force, and are taken upon proper occasions; being extended not only to lands, but also to goods and chattels personal, as in the case of wreck, treasure trove, and the like; and especially as to forfeitures for offences. For every jury which tries a man for treason or felony, every coroner's inquest that sits upon a *felo de se*, or one killed by chance-medley, is, not only with regard to chattels, but also as to real interests, in all respects an inquest of office: and if they find the treason or felony, or even the flight of the party accused (though innocent), the king is thereupon, by virtue of this office found, entitled to have his forfeitures; and also in the case of chance-medley, he or his grantees are entitled to such things, by way of deodand, as have moved to the death of the party." I understand the meaning to be that although it may be proper that an inquest should be held for the purposes of informing the Crown as to its rights, yet the finding of the jury is not essential to the title of the Crown to chattels.

That view appears to me to be borne out by the Irish case to which I have been referred of *Reg.* v. *Toole* (2), in which the conclusion was arrived at, after a careful examination of all the old cases, that "in an indictment for concealing treasure trove it is not necessary to state any inquisition before the coroner or office found as to the title of the queen." That being so, the Crown is entitled to come here and to have its title determined, and, as it would seem to me, most conveniently determined, in an action of this sort, in which questions arise as to the construction of ancient Crown grants and other matters which cannot be properly gone into at the coroner's inquest. I think, therefore, the Attorney-General, on behalf of the Crown, is fully entitled to come here and to have the articles, the title to which is in question, secured until the dispute which has arisen is settled. For that purpose it seems to me that the lord of the manor ought to be made a party, and the learned Solicitor-General is willing that he should be let in, and that the writ should be treated as

(1) 3 Bl. Com. 259. (2) 16 W. R. 439.

amended at once, so that he would be made a Defendant immediately. He appears on this occasion by counsel. The learned counsel for the coroner has asked me that he may not be deprived of the articles until after the inquest which he proposes to hold. I think that is reasonable; but he is willing to give an undertaking not to part with them until the further order of the Court. I am willing to accept that undertaking. That is all that is necessary to dispose of this motion on the present occasion.

The motion, therefore, will stand over generally; but when the coroner has held the inquest, I suggest that the most convenient course would be that he should make an application to the Court when the question of costs can be considered.

Sir *J. Rigby*:—In this case there will be no undertaking in damages. I take that to be settled as applying to the Crown.

STIRLING, J.:—The authorities are to that effect, I think.

On the 17th of December the coroner held another inquest, when the jury gave a verdict that that which was found was treasure trove; that the Defendant *Arkwright* was lord of the manor of *Stoke*, and that as such he was entitled to the treasure trove. This verdict was duly recorded by the coroner upon the inquisition. Notwithstanding this verdict, the Defendant *Arkwright* subsequently withdrew his claim to the treasure, and consented to an order upon a summons taken out by the Treasury on the 19th of February, 1893, by which it was ordered that, on the undertaking of the Solicitors to the Treasury to pay the taxed costs of the coroner, he should deliver up the treasure to the Lords of the Treasury or some one to be named on their behalf; and that all further proceedings in the action should be stayed.

In pursuance of this order the treasure was duly handed over to the Lords of the Treasury.

Solicitors for the Crown: *The Solicitors to the Treasury.*

Solicitors for the coroner; *J. T. & G. F. Marshall.*

Solicitor for the lord of the manor: *H. Andrews*, agent for *W. T. Sale, Leominster.*

G. A. S.

STIRLING, J. 1893 Jan. 17, 18.

LEAROYD *v.* HALIFAX JOINT STOCK BANKING COMPANY.

[1892 L. 1528.]

Practice—Production of Documents—Examination under Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 27—*Transcript of Shorthand-writer's Notes of Examination—Privilege.*

When an examination of witnesses has taken place under sect. 27 of the *Bankruptcy Act*, 1883, upon the application of a trustee in bankruptcy, and with the view of enabling his solicitor to advise him whether an action should be brought with reference to the bankrupt's affairs, the transcript of the shorthand-writer's note of the proceedings at such examination is a document entitled to privilege.

Wheeler v. *Le Marchant* (1) discussed.

Adjourned Summons.

This action was brought by the trustee in bankruptcy of Mr. *Cyrus Brook*, who, up to July, 1891, carried on business at *Halifax* under the style of *Cyrus Brook & Co.* In that month the Defendants, the *Halifax Joint Stock Banking Company*, to whom Mr. *Cyrus Brook* was largely indebted, and who held divers securities from him, closed his account with them. Shortly thereafter, an arrangement was entered into between Mr. *Cyrus Brook* and his three sons, who had previously assisted him in the business, that he should go out of the business, and that it should be sold and transferred to them, and be carried on by them under the style of *Cyrus Brook & Sons*; and in order to facilitate this arrangement the *Halifax Banking Company* consented to open a fresh account with the three sons.

On the 22nd of March, 1892, Mr. *Cyrus Brook* was adjudicated a bankrupt, and Mr. *J. J. Learoyd* was appointed trustee in the bankruptcy.

On the 18th of May, Mr. *J. J. Learoyd*, as such trustee, summoned Mr. *Cyrus Brook*, his said three sons, and Mr. *J. H. Swallow*, the general manager of the *Halifax Banking Company*, to be examined under sect. 27 of the *Bankruptcy Act*, 1883. These

(1) 17 Ch. D. 675.

gentlemen attended on the 18th and 19th of May with their respective solicitors, and the examination was conducted by Mr. *Learoyd's* solicitor, Mr. *Booth*, who obtained from the registrar an order sanctioning the employment of a shorthand-writer to take notes of the examination.

The circumstances attending this examination were stated by Mr. *Booth* in his evidence as follows:—

"The examination under sect. 27 of the *Bankruptcy Act*, 1883, took place in the private room of the district registrar at *Halifax* with closed doors, and was of a strictly private character, and no person was present except the witnesses and their solicitors, together with the Plaintiff and myself, as his solicitor, and the shorthand-writer. I then called the attention of the registrar to the decision of Mr. Justice *Chitty* in the case of *Greys Brewery Company* (1), and objected to the solicitors for the witnesses taking any notes, and intimated that I did not intend to file the evidence when taken. The said examination took place solely for the purpose of enabling me to ascertain the facts in connection with the assignment by the bankrupt to his sons of over £30,000 of property before advising the trustee to bring an action, so as to avoid incurring the expense of some hundreds of pounds in entering into litigation respecting the matter."

On the 2nd of June, 1892, Mr. *J. J. Learoyd* commenced this action against the *Halifax Banking Company* and the three sons of Mr. *Cyrus Brook*, and claimed that the agreement for the sale of the business and property of *Cyrus Brook & Co.* to the three sons, and certain deeds of conveyance, mortgage, and sub-mortgage, by which such sale was carried out, might be set aside as fraudulent and void under the statute 13 Eliz. c. 5, and under the *Bankruptcy Act*, 1883, and for an account and other ancillary relief.

Immediately afterwards, the three sons of Mr. *Cyrus Brook* filed their petition in bankruptcy.

On the 9th of November, 1892, the Defendants, the *Halifax Banking Company*, obtained an order in the usual form for the production of documents in the possession or power of the Plaintiff;

(1) 25 Ch. D. 400, 405, 406.

STIRLING, J. 1893 LEAROYD v. HALIFAX JOINT STOCK BANKING COMPANY.

and, in compliance with that order, the Plaintiff, on the 28th of November, 1892, made an affidavit of documents, and in it he objected to produce the transcript of the shorthand-writer's notes of the examination, under sect. 27 of the *Bankruptcy Act*, 1883, of Mr. *Cyrus Brook*, his three sons, and the manager of the bank on the 18th and 19th of May, 1882. His objection was stated to be on the ground that such transcript had "come into existence for the purpose of furnishing to his solicitors evidence to be used in this litigation, or information which might lead to the obtaining of such evidence for the use of his solicitors to enable them to conduct this litigation and advise him in reference thereto."

On the 5th of December, 1892, the Plaintiff obtained leave to interrogate the *Halifax Banking Company*; and on the same day the bank took out the present summons to consider the sufficiency of the Plaintiff's affidavit of documents, asking that, notwithstanding the objection taken by the Plaintiff, an order should be made for production of the transcript.

The action had proceeded as far as delivery of statements of defence; and the transcript had not yet been filed.

Buckley, Q.C., and *Eyre*, in support of the summons:—

This document is not privileged. It is not a private and confidential communication by a client to his solicitor for the purpose of obtaining legal advice or assistance with reference to litigation: *Anderson* v. *Bank of British Columbia* (1); *Wheeler* v. *Le Marchant* (2). It merely gives the effect and result of an examination under sect. 27 of the *Bankruptcy Act*, 1883, which is a proceeding by the Court: *In re North Australian Territory Company* (3); and must be filed under the Bankruptcy Rules, 1886, rule 12. This shews that what takes place at such an examination was not intended to be kept concealed from other parties to the litigation. The transcript came into existence by the assistance of the Court, and not of the Plaintiff's solicitor. It is most material to the subject-matter of the action, and, not being in the nature of a professional communication of a confidential character

(1) 2 Ch. D. 644. (2) 17 Ch. D. 675.
(3) 45 Ch. D. 87, 96.

it must be produced. At all events, in the present case the affidavit of documents does not shew with sufficient clearness the grounds upon which privilege is claimed: *O'Shea* v. *Wood* (1); *Gardner* v. *Irvin* (2); *In re Franks* (3); *Yate Lee* on Bankruptcy (4).

Hastings, Q.C., and *Swinfen Eady*, for the Plaintiff:—

In *Wheeler* v. *Le Marchant* (5), *Jessel*, M.R., lays down that documents containing information required or asked for by solicitors for the purpose of enabling them to advise their clients, are protected when they have come into existence after litigation commenced or in contemplation, and have been made either for the purpose of obtaining advice as to, or evidence to be used in such litigation, or information which might lead to the obtaining of such evidence. This transcript comes exactly within the class of documents there described. If it had been a transcript of notes taken in a solicitor's office for the purpose of preparing the "proof" of a witness, there could have been no question that it would have been a privileged document; and there is no difference in principle as to this transcript. The examination was in fact a private proceeding, and though the evidence taken at it must be filed, there is no obligation to file it at any particular time; and it has not yet been filed, and need not be previously disclosed. The document is clearly privileged from production: *The Palermo* (6); *In re Greys Brewery Company* (7); *Kennedy* v. *Lyell* (8).

Buckley, in reply.

STIRLING, J.:—

The affidavit of documents which has been made by the Plaintiff in this case is not, perhaps, quite as clear as it might have been as to the grounds on which privilege was claimed; but I cannot say that it is insufficient. The authority most usually referred to upon the law applicable to the question is *Anderson*

(1) [1891] P. 286.
(2) 4 Ex. D. 49.
(3) [1892] 1 Q. B. 646.
(4) 3rd Ed. p. 611.
(5) 17 Ch. D. 675.
(6) 9 P. D. 6.
(7) 25 Ch. D. 400.
(8) 23 Ch. D. 387; 9 App. Cas. 81.

STIRLING, J. 1893 LEAROYD v. HALIFAX JOINT STOCK BANKING COMPANY.

v. *Bank of British Columbia* (1), which was cited by counsel in opening this case. In that case, before the action was actually commenced, but after litigation had become highly probable, the *London* manager of the bank had telegraphed to the manager in *Oregon* to send full particulars of the transaction in question; and on an application by the plaintiff for production of documents, the bank resisted production of the letter sent in answer as being privileged. It was held that the letter was not a privileged document, as it had not been shewn that the agent had been informed that the communication was to be a confidential one for the purpose of being laid before the solicitor for advice, or that the communication was in fact made with a view to his advice being obtained. The judgment of *Jessel*, M.R., in that case seems to me to be a clear and satisfactory exposition of the law; but the case which best shews the length to which the principle has been carried is *Southwark and Vauxhall Water Company* v. *Quick* (2). The head-note is as follows: "Documents prepared in relation to an intended action, whether at the request of a solicitor or not, and whether ultimately laid before the solicitor or not, are privileged if prepared with a *bonâ fide* intention of being laid before him for the purpose of taking his advice; and an inspection of such documents cannot be enforced." In that case Lord Justice *Cotton* said (3) the principle was, that "if a document comes into existence for the purpose of being communicated to the solicitor with the object of obtaining his advice, or of enabling him either to prosecute or defend an action, then it is privileged, because it is something done for the purpose of serving as a communication between the client and the solicitor." There the document was obtained by the client, not the solicitor, and the case is *à fortiori* where (as is more usual) the document is obtained by the solicitor himself.

As to *Wheeler* v. *Le Marchant* (4), I do not think that either Sir *George Jessel*, M.R., or Lord Justice *Cotton*, who were members of the Court which decided that case on appeal, meant to depart from the principles which had been laid down by them in the cases to which I have referred. *Wheeler* v. *Le Marchant* was a

(1) 2 Ch. D. 644.
(2) 3 Q. B. D. 315.
(3) 3 Q. B. D. 322.
(4) 17 Ch. D. 675.

peculiar case. In an action for specific performance of a building contract to take on lease building land, the defendants sought to protect from production letters which had passed between their solicitors and their surveyors; and it was held on appeal that the defendants must produce the letters, except such of them, if any, as the defendants should state by affidavit to have been prepared confidentially after dispute had arisen between the plaintiff and defendants, and for the purpose of obtaining information, evidence, or legal advice with reference to litigation existing or contemplated between the parties to the action. It was contended in that case that all communications to a solicitor for enabling him to advise his client were privileged. The Master of the Rolls said that it had never been decided that documents were protected merely because they were produced by a third party in answer to an inquiry made by the solicitor, and he repeated, in other words, what he had said, in *Anderson* v. *Bank of British Columbia* (1), as to the grounds on which a communication to a solicitor may be protected from production. I do not think that the Court of Appeal intended, in *Wheeler* v. *Le Marchant* (2), to limit the rule of the Court with regard to communications to solicitors in contemplation of litigation, or for the purpose of obtaining evidence with reference to it.

I will now look at the practical effect of that rule. A person apprehensive of an action goes to consult his solicitor, who says that before advising he should like an interview with a third party who is acquainted with the matter. That person is invited to come to the solicitor's office. He comes, and the solicitor writes down what he says, and that is preserved. Such a document would plainly fall within the rules laid down by the late Master of the Rolls, and would be privileged against discovery.

In the present case the client is not an ordinary litigant; he is a trustee in bankruptcy, and he has power to compel information to be given, which an ordinary litigant has not. In such a case as I have just referred to, the client could only rely upon voluntary statements made by a person acquainted with the case. Trustees in bankruptcy and liquidators of companies have wider powers. Sect. 27 of the *Bankruptcy Act*, 1883, provides that the

(1) 2 Ch. D. 644. (2) 17 Ch. D. 675.

STIRLING, J. 1893 LEAROYD v. HALIFAX JOINT STOCK BANKING COMPANY.

Court may, on the application of the Official Receiver or trustee, summon before it the debtor or his wife, or any person known or suspected to have in his possession any of the estate or effects belonging to the debtor, or supposed to be indebted to the debtor, or any person whom the Court might deem capable of giving information respecting the debtor, his dealings, or property, and the Court may require any such person to produce any documents in his custody or power relating to the debtor, his dealings, or property, and may examine such person on oath. Official liquidators, as is well known, have similar powers in the winding up of insolvent companies.

The nature of this 27th section is explained by Mr. Justice *Chitty* in *In re Greys Brewery Company* (1), which was a case under sect. 115 of the *Companies Act*, 1862. That learned Judge, in the course of his judgment, says (2): "The 115th section of the *Companies Act*, 1862, was undoubtedly inserted by the Legislature in that Act on the same principle as a similar clause in the *Bankruptcy Act* of 1849, and there is in the *Bankruptcy Act* of 1869 a section which is substantially to the same effect as that which was in the older Act of 1849, and in the *Companies Act* of 1862. Now, the object of all these sections is to enable the Court to obtain information. I do not say that is the sole object, because other matters are mentioned in the 115th section, but the principal object is to obtain information from any persons capable of giving any information concerning the trade and affairs of the company. The nature of the proceedings is essentially this: The person examined is not examined as a witness; and to talk of examination-in-chief, or cross-examination, or re-examination in a case of this kind, is to use terms that are really not applicable. What is being done is this: discovery is sought to be obtained which may be useful to the Court in the conduct of the proceedings in the winding-up, and to my mind, looking at the section and the purpose for which the provisions of that section were inserted, an examination of this kind must be considered in the nature of a secret proceeding." Then, further on, his Lordship says (3): "The result of the examination—that

(1) 25 Ch. D. 400. (2) 25 Ch. D. 403.
(3) 25 Ch. D. 404.

which is written down—is not evidence against anybody else. It is the statement on oath of the person under examination, but the examination is not a proceeding in the nature of a litigious proceeding between parties, the object of the examination being, as I have already stated, to get information in order to see what course ought to be followed with reference to some matter or some claim which the official liquidator when he applies to the Court, is allowed to state privately." Now, sect. 27 of the *Bankruptcy Act* of 1883 corresponds as to its first four paragraphs with sects. 96, 97, and 98 of the *Bankruptcy Act* of 1869.

The client, then, in this case, having the power of obtaining information conferred upon him by the 27th section of the Act of 1883, goes to his solicitor and asks for his advice. The solicitor says: "You have the power of getting information which I advise you to avail yourself of, so that I may have the means of advising you." The trustee then takes out a summons, and gets leave to examine certain persons named. His solicitor personally conducts the examination and gets a transcript of the proceedings. That transcript is a private document. It is true that the Rules in Bankruptcy provide that the evidence so taken is to be filed; but they do not say that it is to be filed immediately. If that was done the main object of the examination might often be defeated. The point has often been considered both by myself and by other Judges with reference to depositions taken under sect. 115 of the *Companies Act*, 1862. The practice under that section in all branches of the Court is that the depositions, when taken, shall be returned to the Chief Clerk for use in the liquidation; but they are not filed until the Court is satisfied, through the Chief Clerk, that no harm can be done by their publication.

These depositions are accordingly regarded as private documents; and why should not a document obtained by a trustee in bankruptcy for his own information, in order to enable his solicitor to advise him as to future proceedings, be privileged? If, instead of putting the Court of Bankruptcy in motion, under sect. 27, the trustee had, at the instance of his solicitor, written to the bank manager making inquiries, and had got a letter stating the facts, that would have been a privileged communication;

STIRLING, J. 1893 LEAROYD v. HALIFAX JOINT STOCK BANKING COMPANY.

and I fail to see why a document such as a transcript giving the result of information obtained at an examination for the same purpose should not be privileged likewise. Here the examination was conducted by the solicitor himself, which makes the case stronger; and, according to his evidence, he stated the purpose of it to the registrar in bankruptcy. That evidence amounted to this—that the examination took place with the view of enabling the solicitor in his professional capacity to advise the trustee in bankruptcy whether this action should be brought or not. So if privilege has been sufficiently claimed, this document is one which is capable of being privileged. In my opinion, privilege has been sufficiently claimed, and the application fails, and must be refused with costs.

Solicitors: *Jaques & Co.; Walter Helliwell*, agent for *Jubb, Booth, & Helliwell, Halifax.*

W. W. K.

In re KIDD & GIBBON'S CONTRACT.

KEKEWICH, J.

1893

Jan. 24, 25.

[1892 K. 995.]

Vendor and Purchaser—Succession Duty—Sale free from Incumbrances but subject to Leases—Duty in respect of Increased Value on Determination of Leases—Succession Duty Act (16 & 17 *Vict.* c. 51), *ss.* 2, 20 [*Revised Ed. Statutes, vol. xi., pp.* 595, 599].

Where land subject to leases is sold in fee simple free from incumbrances, and without provision as to succession duty, duty which will become payable in respect of the increased value of the property on the determination of the leases, and of which payment has been postponed under sect. 20 of the *Succession Duty Act*, must be borne by the vendor.

THIS was a summons under the *Vendor and Purchaser Act*, 1874, taken out by a purchaser of freehold property comprised in a contract for sale dated the 31st of March, 1892, asking for a declaration that the vendors were liable for and ought to pay the succession duty in respect of the whole of their interest in the property contracted to be sold.

The contract contained (*inter alia*) the following provisions:—

"1. The vendors are to sell and the purchaser is to purchase at the price of £41,000, the freehold property described in the schedule hereto, subject to the leases affecting the same, but free from incumbrances."

"4. The abstract of title is to commence with certain indentures of lease and re-lease, dated respectively the 1st and 2nd of July, 1818; part of the property was demised by a lease (still subsisting) dated in 1813, and the remaining portion was demised by a lease (still subsisting) dated in 1814. Counterparts or copies of the said two leases have been produced to the purchaser, and he shall be deemed to purchase with notice of all the contents thereof."

"6. The property is sold subject to all quit, chief, and other rents, rights of way and other easements (if any) affecting the same, and to any subsisting liability, under inclosure award, covenant, or otherwise, to repair the fences, roads, or streets, and

KEKEWICH, J.

1893

In re KIDD & GIBBON'S CONTRACT.

to the rights of the tenants to fixtures (if any), or to their statutory rights."

"7. The vendors are the only children of *Robert Charles Kidd*, deceased, named in the will of *Fanny Kidd*, dated the 28th of December, 1862. The purchaser shall not require any evidence of this fact, or of the deaths of the said *Robert Charles Kidd* and his wife *Mary Jane Kidd*, other than a statutory declaration of those facts."

The contract contained no mention of succession duty.

Upon the investigation of the title, it appeared that by the will of *Fanny Kidd*, the grandmother of the vendors, the property was demised to her son *Robert Charles Kidd* for life, with remainder to *Mary Jane Kidd*, his wife, for life, with remainder to the vendors. *Mary Jane Kidd*, survived *Robert Charles Kidd*, and died some years prior to the date of the contract. At her death the property was subject to the existing leases referred to in the contract, which would expire in 1897, and the vendors had only paid succession duty on the value of the ground rents, leaving the duty payable in respect of the increased value of the property accruing on the determination of the leases to be paid when the leases expired, in accordance with the provisions of sect. 20 of the *Succession Duty Act*.

The amount of the ground rents was £67 10*s*. per annum; but the annual rack rental was estimated to amount to £4000 or £5000.

In correspondence with the purchaser's solicitors the Commissioners of Inland Revenue had stated that on the determination of the leases further claims for succession duty would arise, and would have to be paid by the then owner of the property unless now commuted or compounded for by the vendors.

The question was now argued whether the additional duty, which would become payable on the determination of the leases in 1897, ought to be discharged by the vendors or the purchaser.

Colt, for the purchaser:—

The duty, being payable in respect of a succession which took place before the date of the contract, is payable by the vendors.

This is the ordinary case of a sale in fee simple free from incumbrances but subject to leases, and the vendors have received by way of purchase-money the entire value of their succession. Though the contract discloses the leases, it does not disclose the fact that there is succession duty chargeable, but remaining unpaid by the indulgence of the Legislature. Though payable *in futuro* it is a charge *in præsenti* which the vendors are bound to discharge. If the liability had been disclosed in the contract and thrown upon the purchaser, he would, of course, have paid a less price for the property. It was not the intention of the Legislature by the *Succession Duty Act* to alter the law as between vendor and purchaser, and there is nothing in sect. 20 of the Act which can alter the incidence of the liability as between them. It is well settled that on a sale of the fee simple in possession by tenant for life and remainderman together, the duty is discharged by the vendors: *Dart's* Vendors and Purchasers (1); *In re Cooper & Allen's Contract* (2); although in that case the succession accrues after the contract, whereas in the present case it accrued previously to the contract. It is doubtful whether the vendors have not obtained the full value of the succession under sect. 37 of the Act. They have, in truth, sold the property for its full market value, freed from a charge which they now say the purchaser ought to bear.

Davenport, for the vendors:—

The duty ought to be paid by the purchaser. By clause 4 of the contract he had notice of the contents of the leases, and his purchase-money was paid for the reversionary value of the property to arise on their determination. By clause 7 he was apprised that a succession had taken place, and knew, therefore, that he was buying a reversionary interest in respect of which a sum would be payable by way of duty when he became entitled to a property of increased value on the expiration of the leases. The rule is clear that where a purchaser buys a reversion or remainder expectant on the determination of a prior estate the duty is payable by him: see *Cooper* v. *Trewby* (3), the

(1) 5th Ed. p. 592; 6th Ed. p. 667. (2) 4 Ch. D. 802, 827.
(3) 28 Beav. 194.

KEKEWICH, J. 1893 *In re* KIDD & GIBBON'S CONTRACT.

case of a remainder in fee expectant on the death of a tenant for life; and *In re Langham* (1), the case of an expectancy. There can be no distinction in principle between the purchase of a reversion expectant on the determination of a term of years and that of a reversion expectant on the determination of a life estate; and in *Hanson* on Succession Duties (2), sect. 20 of the *Succession Duty Act*, dealing with a reversion on a lease, and the 5th section, dealing with a reversion on a life estate, are treated as analogous. The amount of the payment to be made in 1897 is necessarily matter of uncertainty, and can only be compounded with the permission of the Crown.

KEKEWICH, J.:—

It is well settled that the purchaser of a reversion bears, amongst other burdens, that of the payment of succession duty, payable when, by death or otherwise, the reversion is converted into an estate in possession; and, on the other hand, it is equally well settled that where a purchaser buys an estate in possession, notwithstanding that he buys it in part from owners in remainder—as, for instance, where he buys from owners of prior estates with the concurrence of the remaindermen in fee—he is entitled to have the estate in fee in possession cleared from the burden of the succession duty, which will become payable on the determination of the prior estates. In the present case I am dealing, not with an estate in one for life with remainder over, but with an estate in fee simple subject to a lease. No doubt, strictly speaking, that is a reversion. The purchaser does not buy a vacant possession. He takes a reversion expectant on the lease, but not a reversion in respect of which succession duty is to become payable when it becomes an estate in possession. What he takes is for all purposes an estate in possession, and often all the more valuable because the property is let. Now, under what branch of the rule does the present case fall? Assuming, as I do for the moment, that there is nothing in the contract to shew that the purchaser took anything less than an estate in fee simple, subject only to the leases, it seems to me that he is

(1) 60 L. J. (Ch.) 110. (2) 3rd Ed. p. 299.

entitled to have the property conveyed clear of all burdens including this liability in respect of the duty which will be payable out of the property and chargeable on the property by-and-by, but which does not really arise by the determination of the leases, but on an entirely different event. It does not occur to me that the Act of Parliament can govern the conclusion of the Court in a case of this kind, because the question has only to be determined between vendor and purchaser. The rights of the Crown are of course quite clear, however I decide the case. The succession of the vendors to the estate occurred long ago; but the payment of succession duty in respect of the reversionary value was postponed until by the determination of the leases the vendors should become entitled to the enjoyment in possession, and there is consequently now a charge for some amount or other—a burden which cannot be thrown off except by payment to the Crown. To my mind, therefore, it is reasonably clear that the purchaser, taking an estate in possession subject to the leases, is entitled to say to the vendors, "Give me such an estate as I should enjoy if it were discharged from this burden." Then it is said, there is only one way of doing that, viz., that the duty can be compounded, and that cannot be done without the authority of the Crown; that it is a discretionary thing, and that there is a difficulty, as no one knows what will be the value of the property upon the determination of the leases. A complete answer to that is, that if the vendors are unable to discharge the burden, if they have sold the property charged with a burden which they are unable to ascertain, then they fail to make a good title, and the purchaser cannot be compelled to complete. Then it is said that the purchaser really knew that he was buying this property subject to the charge. It is not pretended that it is expressly mentioned upon the face of the contract, or that it is directly disclosed by its terms; but it is said that under clause 4 he had notice of the contents of the leases, and that clause 7 shews that the vendors were claiming as successors in title to some one who was dead; but though that might afford some indication of the nature of the title, there is no intimation on the contract sufficient to shew what it would be necessary

KEKEWICH, J.
1893
In re KIDD & GIBBON'S CONTRACT.

to allege to support the vendor's contention. I hold that a purchaser buying an estate in possession subject to a lease is entitled to have that estate free from succession duty. It follows, that in order to get rid of that obligation the vendor must set out on the face of the contract the existence of the burden, and, I am inclined to think, must even go further and expressly relieve himself from the obligation of discharging that burden. The purchaser's objection is a good one, and the vendors must pay the costs of the proceedings.

Solicitors for the purchaser: *Langley, Gibbon, & Moore.*
Solicitors for the vendors: *Pickering & Neilson.*

C. C. M. D.

KEKEWICH, J.
1893
Jan. 26.

WILLIAMS *v.* JENKINS.

[1892 W. 2013.]

Settled Land Acts—Tenant for Life—Person having Powers of Tenant for Life—Trust for Accumulation of Income for Payment of Debts—Determination or Suspension of Life Estate—Settled Land Act, 1882 (45 & 46 *Vict. c.* 38), *s.* 2 *sub-ss.* 2, 5, 7; *s.* 58 *sub-s.* I. *cl. vi.*

A testator devised his real estate to trustees upon trust to permit his daughter to receive the rents and profits during her life for her separate use, and directed that if a certain claim against him for £1000, settled by him on her marriage, should be enforced, then "all her interest and benefit from the estate" should "cease until all the debts and claims on the same" were paid; with a gift over at her death in favour of her children. After the testator's death the claim for £1000 was enforced. The personal estate of the testator was insufficient for payment of the £1000 and other debts and claims. The daughter, who was the heiress-at-law of the testator, claimed a declaration that she had the powers of a tenant for life, under the settlement created by the will, within the meaning of the *Settled Land Act*, 1882:—

Held, that the life estate given by the will to the daughter was not gone, but only suspended; that there was an implied trust for payment of the debts and claims by the trustees; that when those were paid the daughter would come in again by virtue of her suspended estate, and be equitable tenant for life; and that as the implied trust for payment of debts was one which might be properly carried out by accumulating the rents and profits, if it were necessary from time to time so to do, it was

substantially a "trust for accumulation of income" for payment of debts within sect. 58, sub-sect. I. cl. vi., and the daughter was therefore a person entitled to exercise the powers of a tenant for life.

ADJOURNED SUMMONS.

John Jenkins, by his will dated the 20th of January, 1874, gave, devised, and bequeathed to trustees certain specified real estate, and all other his real and personal estate whatsoever, wheresoever, and of what nature or kind soever the same might be, "Upon trust that they do pay an equal sum with my brother *Lewis Jenkins* towards paying the debt of the *Welsh Wesleyan Chapel, Quaker's Yard*, upon trust, that they do pay the sum of £100 sterling annually out of my estate towards my debt until the whole be paid, and if the estate shall increase in value, such increase to be added to the £100 annually towards paying my debt until the whole be paid, upon trust to permit my daughter *Elizabeth*, the wife of *Morgan Williams*, to hold and receive the rents, issues, and profits thereof during her life, and retain the same for her own separate use and benefit absolutely, free from the debt, control, or engagements of her present husband, or any future husband she may marry, subject to educating her children, and after deducting the payments as aforesaid, and fair payment to the said *Lewis Jenkins* and *John Jenkins* for their services as trustees, and if the claim of the £1000 settled on the marriage of my said daughter *Elizabeth* be enforced for payment, or any disturbance made respecting the same, then all her interest and benefit from the estate to cease, until all the debts and claims on the same be paid, upon trust that at the death of my said daughter *Elizabeth* to permit and suffer my grandchildren of her issue to enter into, hold, occupy and enjoy, or to receive and take the rents and profits as follows," and the testator then proceeded to make certain dispositions in favour of the children of his daughter.

The testator died on the 23rd of January, 1874.

By the settlement made on the marriage of the testator's daughter, and dated the 18th of September, 1867, the testator had charged his real estate with the payment of the sum of £1000 to the trustees of the settlement to be held upon certain trusts for the benefit of the daughter and her children.

KEKEWICH, J.
1893
WILLIAMS v. JENKINS.

After the death of the testator, the trustees of the settlement demanded payment of the £1000.

The personal estate of the testator was insufficient for payment and satisfaction of the £1000 and other debts due from and claims against his estate.

This was a summons by the testator's daughter asking for an order declaring that she was tenant for life, or a person entitled to exercise the powers of a tenant for life, under the settlement created by the testator's will, within the meaning of the *Settled Land Acts*.

Badcock, for the Applicant:—

The Applicant is tenant for life under sect. 2, sub-sect. 5, of the *Settled Land Act*, 1882, as being the person for the time being beneficially entitled to possession. Although the life interest given to her by the will has ceased, yet inasmuch as there is no trust in the will for the payment of debts out of the real estate, she, being the heiress-at-law, remains entitled to possession, and, by the joint effect of sub-sects. 2 and 5 of sect. 2, is tenant for life under the Act: see *Wolstenholme* and *Brinton* (1), and *In re Atherton* (2), which is a clear decision to that effect and governs this case.

If, however, it be held that there is in the will an implied trust for payment of debts out of the real estate, the applicant, independently of her title as heiress-at-law, is a person having the powers of a tenant for life under sect. 58, sub-sect. I. cl. vi., inasmuch as such trust is in substance a trust "for accumulation of income for payment of debts" within the meaning of that sub-section.

Warlters Horne, for the children of the Applicant, adopted the same arguments.

Warmington, Q.C., and *S. B. L. Druce*, for the trustees of the will:—

The Applicant is neither tenant for life within sect. 2, nor a person having the powers of a tenant for life within sect. 58,

(1) 6th Ed. p. 237, 239. (2) W. N. (1891) 85.

sub-sect. I. cl. vi. The case is governed by *In re Strangways* (1), where there was an estate limited to trustees for a term of years to pay debts, and then upon trust to settle and assure the estate to the use of a tenant for life.

[KEKEWICH, J.:—There the Court of Appeal saw that the alleged tenant for life had really no interest until the determination of the preceding term of years.]

The principle of that decision applies to this case: as there the tenant for life had no interest until a given period of time was completed, so here she has no interest until a certain event happens, or rather a given purpose is fulfilled. This is not a mere case of keeping down interest on charges, as in *In re Atherton* (2), but the tenant for life is to take nothing until the debts are paid.

[KEKEWICH, J.:—But as soon as the debts are paid she comes in again as of her original estate.]

She is not now tenant for life. She has a prospect of being so when the debts are paid; but at present she is neither entitled to possession under sect. 2, nor to exercise the powers of a tenant for life under sect. 58, because there is on the true construction of this will, as there was in *In re Strangways*, a paramount trust or purpose which must be satisfied before she can take anything. It is something more than a trust for accumulation of income for payment of debts; it is a paramount trust for payment of debts *quacunque viâ*, whether out of income or *corpus* of the estate.

Badcock, in reply:—

If there is an implied trust for the payment of debts by the trustees, either it must be by accumulation of income, in which case the Applicant must have the powers of a tenant for life under sect. 58, sub-sect. I. cl. vi., or it must be in the nature of an incumbrance or charge on *corpus*, in which case she is tenant for life under sect. 2, sub-sect. 7. It is consistent with the object of the Act that a tenant for life under a will should have a power to sell, and that such power should not be paralysed by

(1) 34 Ch. D. 423 (2) W. N. (1891) 85.

KEKEWICH, J.
1893
WILLIAMS v. JENKINS.

the mere insertion of a trust for payment of debts. On the true construction of this will, the Applicant's life estate is merely suspended until payment of the debts; when that purpose is fulfilled, the estate revives. On the other hand, if her estate under the will has ceased, then as heiress-at-law she is tenant for life under sub-sects. 2 and 5 of sect. 2.

KEKEWICH, J.:—

It was the intention of the Legislature, in passing the *Settled Land Act*, 1882, to confer powers of sale and other powers not before conferred on any person who fairly, according to popular language, could be described as tenant for life of a settled estate. If a man is either legal or equitable tenant for life of an unincumbered property, then he is clearly within the language of the Act, and no difficulty whatever arises. But it occurred to those who framed the Act, that there were numerous cases in which a large variety of persons were not cleanly entitled to life estates, but entitled subject to charges, to portions, or to annual payments for jointures or otherwise, and an endeavour was made to meet all such cases by providing that, notwithstanding that the interest of the person called tenant for life, or in whom the powers of a tenant for life were vested, might be of a shadowy nature, as where there was a tenant for life of an estate incumbered beyond its value, still, for the purposes of the Act, he should remain a tenant for life. That is provided for as regards incumbrances and charges by sect. 2, sub-sect. 7, enacting that "a person being tenant for life within the foregoing definitions shall be deemed to be such notwithstanding that, under the settlement or otherwise, the settled land, or his estate or interest therein, is incumbered or charged in any manner or to any extent." So that the Act recognises what I have pointed out—that a man may be tenant for life of an estate out of which he cannot now, and in all probability never will, get anything at all. Then by a later section—sect. 58—the same policy is pursued with reference to limited owners not being properly described as tenants for life, or, at any rate, not within the definition con-

tained in the earlier part of the Act. I must take it that the Legislature intended to comprise in the description in sect. 58, persons not covered by the language of sect. 2, and in particular of sub-sect. 7, which I have read. It cannot be that it was intended again to describe as persons who might exercise the powers of a tenant for life those persons who had already been described as tenants for life; but in sub-sect. I. cl. vi. of sect. 58 there is this description of a man who is not a tenant for life, but a person who is to exercise the powers of a tenant for life: "A tenant for his own or any other life, or for years determinable on life, whose estate is liable to cease in any event during that life,"—that is to say, before the cesser actually takes place, but when his estate may come to an end at any moment—"whether by expiration of the estate, or by conditional limitation, or otherwise, or to be defeated by an executory limitation, gift, or disposition over,"—in illustration of which one might cite the well-known and familiar example until somebody comes back from *Rome*—"or is subject to a trust for accumulation of income for payment of debts or other purpose." If, therefore, according to that enactment, you find the property given to trustees in trust to accumulate the income for payment of debts or any other purpose and subject to that trust for accumulation in trust for, or to the use of *A.* for life—for it matters not whether the estate of *A.* is legal or equitable—then *A.* has the powers of a tenant for life pending the trust for accumulation, and, as I understand the Act, notwithstanding that in all probability, and more than probability, the trust for accumulation will extend beyond his life; and that is not an estate coming within sub-sect. 7 of sect. 2, or any other sub-section of that section, because it cannot be predicated of *A.* in that case that he is tenant for life; he is only, of course, a person who will be tenant for life when the trust for accumulation comes to an end, and he is not, for the purposes of this Act, made a tenant for life, but only a person who is to exercise the powers of a tenant for life. In the case of *In re Strangways* (1), the Court came to the conclusion that the person there put forward as tenant for life had no estate or interest at all; that there was a term of twenty years

(1) 34 Ch. D. 423.

KEKEWICH, J.

1893

WILLIAMS v. JENKINS.

created in priority to the alleged estate for life; that it was not in any way an estate for life in possession; and, therefore, there was no tenant for life under sect. 2, and no person who could exercise the powers of a tenant for life under sect. 58. The interest which had not come into existence, and could not come into existence until the expiration of the term, could not be recognised as an interest subject to a trust. It was an estate which had no present existence at all.

With that preliminary statement of the law or commentary on the statute, I proceed to see what is the construction of this particular will. The testator was entitled to real estate subject to certain charges, or, as he describes them, "debts and claims," on the same—that is, money which could be raised by proper proceedings by mortgagees or others out of the estate; and one of those charges was a sum of £1000 which he had agreed to pay on the marriage of his daughter, whom he was minded to make tenant for life under his will. Whether that sum was directly charged or not is immaterial, because it was a debt of his, and as I know that his personal estate was insufficient to pay his debts, it became by that mere fact a charge on his real estate. He desired to make her tenant for life, and that, subject to her life estate and not otherwise, the property should descend to her children. He gives her a life estate in some peculiar language, which it is fortunately not my duty now to construe. He gives the property to her for life for her separate use, subject to educating her children, and after deducting the payments to which he particularly refers. I think that, combining that with the previous language of the will, there is a devise of the property to the trustees, and combining that with the direction to pay debts, the legal estate must be vested in the trustees of the will, notwithstanding that otherwise the words would be sufficient to give the legal estate to the tenant for life. Then, having given her a life estate of that character, the testator proceeds as follows:—[His Lordship read the rest of the will as above set out, and continued:—] I need not now consider what is the meaning of the word "disturbance," whether it is simply equivalent to the vulgar word "row," or refers to disturbance of property in a technical sense. The clause apparently points to the entire

cesser of her life estate, and, as it is admitted that payment has been enforced, if that were all the testator had done, the life estate would have ceased, and it would be a question what happened to the estate pending her life, whether it descended to her as heiress-at-law, and if it so descended to her, then whether she could be properly regarded as a tenant for life for the purposes of the *Settled Land Act*. But that question, to my mind, does not arise, because, though he uses the word "cease," he does not mean cesser by way of absolute determination once for all; but he adds, "until all the debts and claims on the estate be paid"; so that he is contemplating something less than cesser in the proper sense of that word. He is contemplating, and fairly expresses, suspension until the debts and claims should be paid, not the destruction of the life estate which had before been given to her. I apprehend that the estate of the lady does not cease altogether, but is suspended until the debts and claims have been paid, and that when those have been paid, her estate revives again. Then what happens in the meantime? Where has the estate gone? Mr. *Badcock* argues that as the testator gives no power to any one in respect of the debts on the estate, but the estate is not to go over until the death of the daughter—that is perfectly clear, though the children are to take—somebody must have the estate, and somebody must do what the testator has as clearly as possible said was to be done, namely, see that the debts and claims are paid. If it were necessary for the present purpose, I should not have the smallest hesitation in implying an estate in the trustees for that purpose, and a direction to them to pay the debts and claims; but as I have already held that they take the legal estate, there is no difficulty whatever about that. During the suspension, instead of treating the daughter as equitable tenant for life, they are to pay the debts and claims, and when once the debts and claims have been paid, the daughter will come in again, by virtue of her suspended estate, and be again equitable tenant for life in possession. That is my construction of the will.

Now, in what does this case differ from that of an estate for life subject to a trust for accumulation for payment of debts? It differs in two respects. In the first place, there is no trust for

KEKEWICH, J. 1893 WILLIAMS v. JENKINS.

accumulation in the way in which lawyers speak of accumulation, because there are no words directing an accumulation; and, secondly, there is no trust here, except by implication, for payment out of income. It is merely that debts and claims are to be paid. It may be that it is necessary to sell or mortgage the *corpus* for that purpose. But I think it would be a narrow construction of an Act of Parliament, having a policy such as I have endeavoured to expound, to say that the phrase "subject to a trust for accumulation" means only when there is such a trust for accumulation of income as is to be found in well-drawn precedents. The trustees here could properly do their duty by receiving the income and paying it over from time to time in reduction of the mortgage debts. It may be that, the mortgagees not being bound and not being willing to accept payment piecemeal, the trustees must accumulate the money. At any rate, that would be a proper way of treating the rents and profits. I think that in substance, though not in precise words such as would be found in well-drawn wills, this is really a trust for accumulation, and that during its continuance the lady's life estate is not gone, but only suspended; and though I suppose the draughtsman of the section never thought of a case exactly like this, she is, within the meaning of the Act, tenant for life subject to a trust for accumulation for payment of debts. That being so, I think she has the power of a tenant for life under this section, including a power of sale, and there must be a declaration to that effect.

Solicitors: *Crowders & Vizard; J. H. Wrentmore,* agent for *Frank James & Sons, Merthyr Tydvil.*

C. C. M. D.

SCHOLEY *v.* PECK.

ROMER, J.

1893

Jan. 11, 19.

[1891 S. 3111.]

Solicitor—Charging Order—"Property recovered or preserved"—Action for Specific Performance—Mortgage—Priority—Solicitors Act (23 & 24 *Vict. c.* 127), *s.* 28 [*Revised Ed. Statutes, vol. xiii., p.* 881].

In 1868 *D.* mortgaged three leasehold houses to the trustees of *M.*'s settlement. In 1877 *M.* agreed to sell the three houses to *S.*, the purchase-money being payable by instalments. In 1881 *S.* mortgaged his interest under the agreement to *C.* In 1891 the trustees, as mortgagees, advertised the three houses for sale by public auction. At this time *S.* had paid the instalments for one house, and he brought an action against the trustees and *M.*, claiming specific performance of the agreement, and an injunction to restrain the sale. At the trial, the Defendants were ordered to convey to *S.*, or his mortgagees, the one house in respect of which the purchase-money had been paid, and a set-off of costs was directed.

Pending the trial, *C.* had refused either to release her charge over the one house in question or to concur in any way with *S.* in the prosecution of his action.

The solicitors of *S.* applied for a charging order on the house to secure to them their taxed costs of the action:—

Held, that they were entitled to the order, and that it had priority over *C.*'s mortgage.

In the year 1868 one *Dormer* conveyed, by way of mortgage, to *J. K. Peck*, *R. J. King*, and *K. Peck* (the trustees of the marriage settlement of *J. H. Maynard*), three leasehold houses, Nos. 83, 109, and 111, *Pembroke Road, Kilburn*, in the county of *Middlesex*, to secure the repayment of £800 with interest.

On the 3rd of July, 1877, *J. H. Maynard* without, as he alleged, the concurrence of his said trustees, entered into a written agreement with the Plaintiff for the sale of the said three houses to the Plaintiff for the sum of £800, payable by instalments. The agreement contained a power for *J. H. Maynard* to determine it in certain events, and a proviso that, if it should be determined under the said powers by reason of any default of the Plaintiff, the Plaintiff should notwithstanding be entitled to an assignmeut for the residue of the term of one of the said houses for every principal sum of £266 13*s.* 4*d.* previously paid by him.

ROMER, J.
1893
SCHOLEY
v.
PECK.

In July, 1891, the said trustees, under the powers of their mortgage deed, advertised the said three houses for sale by public auction. At this time the Plaintiff had paid instalments under the agreement amounting to £276. Thereupon the Plaintiff commenced this action against the said trustees and *Maynard*, claiming specific performance of the said agreement so far as the same was subsisting, an injunction to restrain the Defendant trustees from selling the house No. 111 *Pembroke Road*, and other relief. Consequently the Defendants withdrew that house from the sale, and gave an undertaking not to sell it until the trial of the action. On the delivery of the statement of defence the Plaintiff's solicitors became aware, for the first time, that the Plaintiff had by deed, dated the 1st of October, 1881, charged his interest under the said purchase agreement by way of mortgage in favour of a Miss *Cardale*. On this, correspondence ensued between the Plaintiff's solicitors and Miss *Cardale's* solicitors; but she declined either to release her charge on No. 111 *Pembroke Road*, or to concur with the Plaintiff in prosecuting his action.

By the judgment in the action the Defendants were ordered to assign the lease of No. 111 *Pembroke Road* to the Plaintiff or his mortgagees, and the judgment directed that such costs as were payable by the Defendants to the Plaintiff should be set off against the costs of a counter-claim by the Defendants, and other costs under the judgment, payable by the Plaintiff to the Defendants.

The Plaintiff's solicitors now applied for a charging order on No. 111 *Pembroke Road* aforesaid, "being property recovered or preserved by them in the action," for their taxed costs, charges, and expenses as solicitors for the Plaintiff in the action.

Howland Jackson, for the solicitors:—

The result of the action has been to prevent the sale of the house and to recover and preserve it for the Plaintiff and his mortgagee, Miss *Cardale*. A charging order under the *Solicitors Act*, 1860, is in the nature of salvage and overrides the interests of all parties in the property preserved: *Faithfull* v. *Ewen* (1);

(1) 7 Ch. D. 495.

Charlton v. *Charlton* (1); *Greer* v. *Young* (2). The solicitors, therefore, are entitled to priority over Miss *Cardale's* mortgage.

Borthwick, for Miss *Cardale*:—

The charging order cannot have priority over this mortgage, which was made long before this action was commenced. The doctrine of salvage stands upon an implied authority or request: *Falcke* v. *Scottish Imperial Insurance Company* (3). There was no such implied authority here. There was, on the contrary, a distinct refusal by the mortgagee to allow these solicitors to act for her.

Howland Jackson, in reply.

1893. Jan. 19. ROMER, J.:—

I have considered the cases cited in the course of the arguments and others bearing on charging orders obtained under the *Solicitors Act*, 1860. These authorities shew that what is recovered by the action of the solicitor is to be treated as if he had earned salvage, and that he is to be paid for his services on the theory that salvage services have been rendered. The 28th section of the Act is very general in its terms. It authorizes a charge not on the mere interest of the Plaintiff, but on all property recovered in the action, whether for the Plaintiff only, or for him in connection with others. It is not necessary that the property charged should belong to the same person as employed the solicitor; but it must be by reason of the employment that the property is preserved. Here undoubtedly the property was preserved by the action brought by these solicitors on behalf of the Plaintiff, and but for the proceedings taken by them the mortgagee would have lost her security. In my judgment the case is governed by the principle of *Greer* v. *Young*. I hold, therefore, that the solicitors are entitled to the charge for which they ask, not only against the Plaintiff, but also against the mortgagee, who is taking the benefit of the action, and over whose mortgage they must have priority. The charge will

(1) 49 L. T. (N.S.) 267. (2) 24 Ch. D. 545.
(3) 34 Ch. D. 234.

ROMER, J. 1893 SCHOLEY v. PECK.

include their taxed costs, charges, and expenses properly incurred in preserving the property; but, having regard to the peculiar circumstances of this case, it must not extend to all the costs of the action and counter-claim. [His Lordship then, by consent, dealt with this point, and directed what costs should be included in the charge, and continued:—]

The costs of Messrs. *Metcalfe & Sharpe* of this petition must be taxed as between solicitor and client and added to the charge, and the mortgagee can have her costs, and may add the same to her security. There will be liberty to apply for the purpose of enforcing the charge.

Solicitors: *Metcalfe & Sharpe; Iliffe & Co.*

H. L. F.

In re WEST CUMBERLAND IRON AND STEEL COMPANY.

VAUGHAN WILLIAMS, J.

[0020 of 1892.]

1893 Jan. 11, 21.

Company—Winding-up—Restraining Proceedings against Company—Scotch Action—Arrestment jurisdictionis fundandæ causâ—Arrestment on the Dependence—Secured Creditors—Companies Act, 1862 (25 & 26 *Vict.* c. 89), *ss.* 87, 151 [*Revised Ed. Statutes, vol. xiv. pp.* 222, 235.]

Where, prior to the commencement of the winding-up of an English company, a creditor has arrested property of the company in *Scotland jurisdictionis fundandæ causâ*, and has followed this up by bringing an action in *Scotland*, and making an arrestment on the dependence of the action, he has become, subject to his obtaining a decree in such action, a secured creditor, and will not be restrained from continuing his action.

In such a case the judgment or decree draws back to the date of the arrestment on the dependence, and the security thereby obtained applies to the debt subsequently established.

If the arrestments are impeached on the ground that they were obtained on a misstatement of facts, this is only a ground for the recall of the process by the Scotch Court, and, until so recalled, the English winding-up Court will treat the process as having been validly issued.

ON the 21st of May, 1892, the *West Cumberland Iron and Steel Company, Limited*, the registered office of which was at *Workington*, in the county of *Cumberland*, passed an extraordinary resolution for voluntary winding-up, and appointing *W. B. Peat* liquidator.

On the 25th of June, 1892, on the petition of a debenture-holder presented on the 23rd of May, 1892, an order was made by Mr. Justice *Vaughan Williams* continuing the voluntary winding-up under the supervision of the Court.

Prior to the commencement of the voluntary winding-up the company had had certain dealings with *J. A. Hope & Co.*, a firm carrying on business at *Whitehaven*, also in the county of *Cumberland*.

Under a contract dated the 18th of February, 1892, *J. A. Hope & Co.* had to pay, at the company's bankers, to the company £1104 in cash, in exchange for bills of exchange and an invoice,

VAUGHAN WILLIAMS, J.

1893

In re WEST CUMBERLAND IRON AND STEEL COMPANY.

for 500 tons of pig-iron, to be delivered free on board at *Workington*.

At the request of *J. A. Hope & Co.* (sent by telephone to the secretary of the company) the bills of lading and invoice were, by the secretary's directions, sent on the 17th of March, 1892, by the company's bankers to the *Glasgow* branch of the *Royal Bank of Scotland*, to be exchanged for the cash there.

J. A. Hope & Co., on the 18th of March, 1892, paid £1104 into the Scotch bank to the account of the company, and received in exchange the bills of exchange and invoice; and thereupon, before the £1104 was remitted by the bank at *Glasgow*, in the ordinary course of business, to the company's bankers, *J. A. Hope* caused to be executed certain letters of arrestment *jurisdictionis fundandæ causâ* on the said sum of £1104.

The letters of arrestment had been signetted on the 29th of February, 1892, and were issued in the name of Her Majesty to certain messengers-at-arms, "our sheriffs in that part." After reciting that the company was indebted to *J. A. Hope & Co.*, the complainers, in the sum of £1691 12*s.* 4*d.*, for goods supplied and damages for breach of contract, and that the company "are foreigners, and do not reside or have a place of business in *Scotland*, but that they have debts and effects belonging and addebted to them in the hands of several persons in this country which they intend to uplift and withdraw therefrom to the prejudice of the complainers," &c., the letters directed the sheriffs on sight thereof to "pass and in our name and authority lawfully fence and arrest all and sundry goods and gear, debts and sums of money, and all other moveable effects pertaining or indebted to the said *West Cumberland Iron and Steel Company, Limited*, wherever, or in whose hands soever, the same may be or can be found, to remain in sure fence and arrestment *jurisdictionis fundandæ causâ*, according to justice," &c.

It was alleged in the evidence filed on behalf of the liquidator that, when these letters of arrestment were issued, the company had in fact no property, debts, or effects in *Scotland*, and that, except as above stated, it never had subsequently any property, debts, or effects in that country.

On the 18th and 19th of March, 1892, the messengers-at-arms

served the letters of arrestment on the *Glasgow* branch of the *Royal Bank of Scotland*, and complied with other requisites of Scotch law necessary to constitute execution of arrestment *jurisdictionis fundandæ causâ*.

A summons was issued in the First Division of the Court of Session, at the instance of *J. A. Hope & Co.*, against the company, "against whom arrestments have been used *ad fundandam jurisdictionem*," that they should be "decerned and ordained" to make payment to the pursuers of the debt of £1691 12*s.* 4*d.*, with interest and costs; and on the 19th and 21st of March, 1892, arrestments on the dependence of the action were executed in virtue of a warrant of arrest contained in the summons.

On the 23rd of June, 1892, the Lord Ordinary appointed the case to be put to the roll of the 29th of June, 1892, to adjust and close the record; and on the 29th of June, 1892, the Lord Ordinary closed the record on the summons and certain specified defences; "and in respect it is stated that in the liquidation of the Defenders' company steps are about to be taken to stay proceedings in this and similar actions, sists process *in hoc statu*."

On the 11th of January, 1893, the liquidator moved on notice that *J. A. Hope & Co.* might be restrained "from further prosecuting an action or summons now depending in the Court of Session in *Scotland*, wherein the said *J. A. Hope & Co.* are Pursuers, and the said company is Defender, or any other legal proceeding whatsoever against the said company, and from attaching or arresting a certain sum of £1104 or thereabouts, moneys of the said company in the hands of the *Royal Bank of Scotland*, and from taking or continuing any further proceedings whatsoever in relation to the said moneys."

J. A. Hope & Co. moved on notice that, notwithstanding the winding-up, they might be at liberty to continue and prosecute the Scotch action or summons, and that in the event of their being successful, they might be at liberty to enforce the attachments or arrestments obtained by them of moneys of the company in the hands of the *Royal Bank of Scotland*.

The motions were heard together on the 11th of January, 1893, when evidence to the effect above stated was adduced.

It was also in evidence that the matters in dispute were with

VAUGHAN WILLIAMS, J.

1893

In re WEST CUMBERLAND IRON AND STEEL COMPANY.

reference to contracts entered into and to be performed entirely in *England*.

J. A. Hope & Co. filed an affidavit by Mr. *W. K. Morton* (solicitor before the Supreme Court of *Scotland*, and agent for the Pursuers in the Scotch action), and Mr. *Asher*, Q.C., Solicitor-General for *Scotland*, in which the former stated as follows:—

"2. The proceedings in that action were as follows: On the 29th day of February, 1892, letters of arrestment at the instance of the Pursuers were applied for to, and obtained from, the Court of Session to attach all moneys and goods in *Scotland* belonging to the Defenders (the above-named company), in order to found jurisdiction, upon which letters arrestments were duly executed upon the 18th and 19th days of March, 1892. Further, that the summons passing under Her Majesty's Signet was obtained at the instance of the Pursuers against the Defenders, containing *in gremio* a warrant to arrest on the dependence of the action, upon which warrant arrestments were executed upon the 19th and 21st of March, 1892."

And Mr. *Asher* said:—

"4. I am informed that in addition to the arrestments mentioned [in the closed record] as having been executed on the 18th and 19th of March, 1892, *ad fundandam jurisdictionem*, further arrestments on the dependence, in virtue of a warrant of arrest contained in the summons in the said action, were executed upon the 19th and 21st days of March, 1892. According to the law of *Scotland*, the latter arrestments operate as an attachment in security.

"5. In the event of Messrs. *J. A. Hope & Co.* obtaining a decree in their said action for a sum of money, the decree would draw back, in my opinion, to the dates of the arrestment on the dependence, and Messrs. *J. A. Hope & Co.* would, in my opinion on obtaining the said decree, have an absolute preference over the funds arrested to the extent of the sum to which they might be found entitled in the action." "I am of opinion that had the winding-up of the above-named company been proceeding in *Scotland*, the Court would have granted leave to Messrs. *J. A. Hope & Co.* to continue their said action, so as to afford them an opportunity of establishing that there was a sum due to them for

which they had secured a preference by their arrestments: *Benhar Coal Company* v. *Turnbull* (1)."

The liquidator filed an affidavit by Mr. *Robert Campbell*, a member of the Scotch and English Bars, which stated as follows:—

"2. The attachment created by an arrestment on the dependence of an action, such as the arrestments on the dependence of the Scotch action in question in the present case, is conditional, as to any permanent effect, upon a decree constituting the debt being made in the action.

"3. It is in the power of the Scotch Court at any time to recall (and in effect annul) the arrestments, upon terms or unconditionally, as may appear just, *i.e.*, on grounds legal or equitable: 1 & 2 Vict. c. 114, s. 20.

"4. The warrant for the original arrestment *ad fundandam jurisdictionem*, contained in the letters . . . . has been obtained upon an *ex parte* application, in which it is expressly stated that the *West Cumberland Iron and Steel Company* are foreigners, and do not reside or have a place of business in *Scotland*, but that they have debts and effects in the hands of several persons" in this country (*i.e.*, in *Scotland*), "which they intend to uplift and withdraw," &c. Upon this statement the letters are signetted (*i.e.*, issued under the seal and sanction of the Supreme Court in *Scotland*) on the 29th of February, 1892.

"5. It is elementary law in *Scotland* that a person domiciled abroad is not liable to the diligence (or process) of the Scotch Courts unless he has either property in *Scotland* or comes personally into the country, and the statement that the company have effects 'in this country,' that is to say, in *Scotland*, was the essential ground of granting the warrant, which otherwise would have been *ultrà vires* of any Scotch Court.

"6. The warrant for arrestment on the dependence of the action is likewise obtained on what is essentially an *ex parte* application. The warrant may be (1 & 2 Vict. c. 114, s. 16), and in the present case is, inserted in the summons, which, when signetted (in the same way as the sealing of the writ of summons in the central office here), contains two distinct and separate warrants: (1.) The

(1) 10 Court Sess. Cas. 4th Series, 558.

VAUGHAN WILLIAMS, J.

1893

In re WEST CUMBERLAND IRON AND STEEL COMPANY.

warrant to the person acting as sheriff *pro hac vice* to cite the defenders to appear and defend the action; (2.) the warrant (pending the action) to arrest his goods. The statement in the summons that arrestments (*scilicet*, valid arrestments) *ad fundandam jurisdictionem* have been issued against the company, is an essential element of the representation on which the warrant is issued for the latter as well as for the former purpose.

"7. In the case of *Benhar Coal Company* v. *Turnbull* (1), referred to in the joint affidavit of Mr. *Alexander Asher*, the Solicitor-General for *Scotland*, and *W. K. Morton*, the action and the liquidation were both in *Scotland*; and there was no question as to the competency of the action. It appears from the report, and from the judgment of Lord *Shand*, that decree had actually been obtained in the action, although in the judgment of the Lord President, with which Lords *Deas* and *Mure* concurred, the decision is placed on the ground that the admissions made in the liquidation, having regard to the special terms on which the arrestments had been recalled, were equivalent to a decree in the action."

O. L. Clare, and *Alexander Young*, for the liquidator:—

Under sects. 87 and 151 of the *Companies Act*, 1862, the action cannot be proceeded with without leave of the winding-up Court, and the Plaintiff may be restrained by injunction from proceeding with it. This company is an English one; the Pursuers in the action are English traders; and the contracts sued on were made and intended to be performed in *England*. The Scotch Court would have no jurisdiction to entertain the action unless the Defendants had come into *Scotland* or held property there. There is now in *Scotland* property of the company; but its location there was obtained under such circumstances that this Court ought to prevent the Pursuers from relying on the property being in *Scotland* as a ground for giving the Scotch Court jurisdiction. When the letters of arrestment *ad fundandam jurisdictionem* were obtained, the company neither resided nor held property in *Scotland*, and such letters were obtained on a misrepresentation that there was property of the company in *Scotland*.

(1) 10 Court Sess. Cas. 4th Series, 558.

On the request of the Pursuers certain documents of the company were sent to *Scotland*, and the money exchanged for those documents is the fund in *Scotland* on which the Pursuers rely as giving jurisdiction to the Scotch Courts. But this Court will not allow them to avail themselves of such a device in order to obtain a priority over the other creditors of the company, which they would not otherwise have possessed. Where before a bankruptcy a creditor went into *Scotland* and made arrestment on debts due to the bankrupt, but had not obtained sentence before the bankruptcy, he was restrained from getting a priority by means of the arrestment: *M'Intosh* v. *Ogilvie* (1). And if, after assignment of a bankrupt's estate, a creditor, knowing it and residing in *England*, attached money of the bankrupt abroad, the assignees could recover the amount: *Hunter* v. *Potts* (2). The decision in *Benhar Coal Company* v. *Turnbull* (3) is not an authority that arrestments such as these made the Pursuers secured creditors, for there a decree had been obtained, and there was, moreover, an admission that the debt was due from the company.

[VAUGHAN WILLIAMS, J.:—The Judges there say that, to make the proceeding available as a security, the pursuer must have obtained a decree, or something equivalent to it.]

Mr. *Campbell's* affidavit shews that arrestments obtained by the means used by the pursuers may be recalled by the Scotch Court, and this Court will not allow them to take advantage of an unfair attempt to obtain priority which the law of *England* would not allow. The first arrestments could not found jurisdiction because the company had then no property in *Scotland*, and the subsequent arrestments were not executed for that purpose, but for the purpose of security.

Haldane, Q.C., and *Gatey*, for *J. B. Hope & Co.*:—

The Pursuers have by the Scotch proceedings become secured creditors, and will be allowed, therefore, to continue their proceedings. The company's pleadings in the Scotch action really amount to an admission of the debt and a submission to the jurisdiction. In *Benhar Coal Company* v. *Turnbull*, the Court

(1) 2 Rev. Rep. 355, n. (2) 4 T. R. 182; 2 Rev. Rep. 353.
(3) 10 Court Sess. Cas. 4th Series, 558.

VAUGHAN WILLIAMS, J.
1893
In re WEST CUMBERLAND IRON AND STEEL COMPANY.

approved *Mitchell* v. *Scott* (1), in which it was held that arrestments used on the dependence of an action confer a preference although the defender be sequestrated before decree is obtained in the action, provided they be followed up without undue delay. There was no decree in *Benhar Coal Company* v. *Turnbull* (2). When an arrestment has been obtained the granting of a decree is almost a formality, and when it is made it draws back to the arrestment. The Pursuers are now in the same position as mortgagees who have commenced a foreclosure action against the company; though they have not obtained their final decree, they must be allowed to go on with their proceedings to obtain it, notwithstanding the winding-up: *In re David Lloyd & Co.* (3). Any question of irregularity or jurisdiction should be determined by the Scotch Court.

1893. Jan. 21. VAUGHAN WILLIAMS, J., delivered judgment as follows:—

The question in this case arises on two motions, the one by *J. A. Hope & Co.*, of *Whitehaven, Cumberland*, for an order that they, notwithstanding the winding-up of the company, may be at liberty to continue and prosecute an action or summons now depending in the Court of Session in *Scotland*, wherein they are the Pursuers and the company the Defenders, and that in the event of their being successful they may be at liberty to enforce the attachments or arrestments obtained by them of moneys of the company in the hands of the *Royal Bank of Scotland*; the other a motion on behalf of the liquidator that *Hope & Co.* may be restrained from further prosecuting the said action and arrestments. The question, to my mind, which arises on these motions is really whether Messrs. *Hope & Co.*, by virtue of the proceedings in *Scotland*, have become secured creditors, for, if the effect of those proceedings has been to make Messrs. *Hope & Co.* secured creditors, they are, in my opinion, entitled to go on with their action in *Scotland*, in so far as it is necessary to give effect to the security which they have obtained. It seems to me that

(1) 8 Court Sess. Cas. 4th Series, 875.
(2) 10 Court Sess. Cas. 4th Series, 558.
(3) 6 Ch. D. 339.

the question whether Messrs. *Hope & Co.* have by their proceedings in *Scotland* obtained a valid security is a question of Scotch law; while the question whether Messrs. *Hope & Co.* ought to be allowed to continue this action and arrestment is a question for me to determine under the *Companies Act*, 1862. Now, there has been laid before me evidence by distinguished Scotch lawyers as to the Scotch law. [His Lordship read paragraphs 4 and 5 of the affidavit containing the evidence of the Solicitor-General for *Scotland*, and continued:—]

This opinion seems to me to be based on undisputed facts which are set forth in the earlier portion of the affidavit. On the other hand, there is an affidavit on behalf of the liquidator by Mr. *Robert Campbell*, a practising member of the Scotch Bar of thirty years' standing, and a member, also, of the English Bar. Mr. *Campbell* states that it is within the power of the Scotch Courts to recall, and in effect annul, arrestments such as those obtained by Messrs. *Hope & Co.* That this is so is not in dispute. Mr. *Campbell* goes on to suggest that the warrant for the original arrestment *ad fundandam jurisdictionem* was obtained on a misstatement of facts—viz., that the Defenders had effects in *Scotland* —and, in paragraph 5, that a person not domiciled in *Scotland* is not liable to the diligence process of the Scotch Courts unless either he has property in *Scotland* or comes personally into the country; and he impeaches the validity of the warrant for arrestment on the dependence on the same grounds. Now, assuming all this to be true in fact and law, it seems to me that this only affords a ground for the recall of the Scotch process by the Scotch Courts, but that, unless such process is recalled I am bound to deal with it as validly issued. Mr. *Campbell* goes on to deal with the case of *Benhar Coal Company* v. *Turnbull* (1), and to difference that case, which seems to be an authority against the contention of the liquidator, on the ground that in that case there was no question as to the competency of the action, and also on the ground that in that case a decree or forthcoming had been actually obtained by the creditor. The question of competency, in my opinion, is a question, as I have said, for the Scotch Courts and not for me. As for the absence of a decree, I

(1) 10 Court Sess. Cas. 4th Series, 558.

VAUGHAN WILLIAMS, J.

1893

In re WEST CUMBERLAND IRON AND STEEL COMPANY.

am of opinion from the judgments of the Lords of Session, cited before me in argument, that the obtaining of the decree before the winding-up was not essential to the validity of the security of the creditor according to the judgments in that case. The Lord President, at the conclusion of his judgment, says (1): "I am therefore of opinion that there is nothing in the Act of 1862, or in any of the other Companies Statutes, which can operate in the way of excluding Mr. *Turnbull* from the benefits which he has secured by the use of these arrestments, and that the parties here are in the same position in which they would have been in an ordinary sequestration where diligence had been done more than sixty days before its commencement. But it has been urged further that a diligence of this kind must be timeously followed up. It appears to me that it was so in this case. If the creditor had been compelled to proceed with his action in order to obtain a decree, the Court in the exercise of its discretion would have authorized him so to do, for this is a matter clearly within the discretion of the Court, and one which in the circumstances the interests of justice between the parties would have demanded. On the whole matter, then, I have come to the conclusion that this diligence has given Mr. *Turnbull* a good preference." So, also, Lord *Shand*, at the conclusion of his judgment, says (2): "In this case the creditor has laid a *nexus* on the funds of the company, and to determine the validity of that *nexus* I think that he would have been entitled to have proceeded with his action, and to have obtained a decree in order to make available any preference which the use of his diligence might have secured to him, and that the Court would have granted leave accordingly. It seems to me that the parties here are in the same position as the parties were in the case of *Mitchell* v. *Scott* (3) already referred to, which I think must be held to rule the present case. I therefore agree with your Lordship in thinking that Mr. *Vair Turnbull* is entitled to be ranked preferably on the assets of this company." The head-note in *Mitchell* v. *Scott* is as follows: "Arrestments used on the dependence of an action confer a preference, although the

(1) 10 Court Sess. Cas. 4th Series, 562. (2) 10 Court Sess. Cas. 4th Series, 563.
(3) 8 Court Sess. Cas. 4th Series, 875.

defender be sequestrated before decree is obtained in the action, provided they be followed up without undue delay." It seems to me from these cases that, according to the Scotch law, an alleged creditor can, by the process used by Messrs. *Hope*, obtain security for a debt which he has not established by the judgment of the Court, and that it is open to him to proceed with an action to establish the debt, provided he does so without undue delay; and that when he has done so the judgment or decree will draw back to the date of the arrestments on the dependence, and that the security obtained by the arrestments will apply to the debt subsequently established. The arrestments in the present case seem to have been executed on the 19th and 21st of March, 1892. The date of the petition is the 23rd of May, 1892, and the date of the resolution for voluntary liquidation the 21st of May, 1892. It seems to me, therefore, that Messrs. *Hope* are, subject to their obtaining a decree in the Scotch Courts establishing their debt, secured creditors. I further think that Messrs. *Hope* could not enforce their security by proceedings in the winding-up, and that, therefore, I ought to allow the action and arrestment in the Scotch Court to continue; and I therefore grant the motion of Messrs. *Hope* and dismiss the motion of the liquidator—in each case with costs.

Solicitors for the liquidator: *Blunt & Lawford*, agents for *Brockbank, Helder, & Co., Whitehaven.*

Solicitors for *J. A. Hope & Co: Harrison & Powell*, agents for *Thomas Brown, Whitehaven.*

F. E.

VAUGHAN WILLIAMS, J.

1893

Jan. 16, 26.

FOWLER *v.* BROAD'S PATENT NIGHT LIGHT COMPANY.

[1891 F. 1833.]

Company—Winding-up—Debentures charging Uncalled Capital—Debenture-holders' Action—Making Calls—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *ss.* 95, 98, 102 [*Revised Ed. Statutes, vol. xiv., pp.* 223, 224, 225]—*Companies* (*Winding-up*) *Act*, 1890 (53 & 54 *Vict. c.* 63), *ss.* 12, 13—*Companies* (*Winding-up*) *Rules*, 1890, *r.* 92.

When a company is ordered to be wound up, the power of its directors, under its constitution, to make calls on shares *ipso facto* comes to an end, and the only power to make calls is that which is by statute given to the liquidator acting in the winding-up.

Therefore, where uncalled capital has been charged by the company in favour of debenture-holders, and the company is ordered to be wound up, the Court has no jurisdiction to order either a receiver appointed in an action brought to enforce the debentures, or the liquidator, to make a call in the action, but can only order the liquidator to make the call in the winding-up. The receiver in the action may, however, be empowered to take proceedings in the name of the liquidator for getting in the call.

Broad's Patent Night Light Company, Limited, was, on the 20th of March, 1890, registered under the *Companies Acts*, 1862 to 1883, with a capital of £20,000 in £1 shares.

The company issued 300 first or A mortgage debentures for £100 each, by each of which it agreed to pay to the persons therein named, or other the registered holder for the time being, £100 on the 1st of February, 1911, or upon such an earlier date as by the conditions indorsed on the debenture the same should become payable, and to pay interest half-yearly in the meantime. And the company thereby charged with the payments aforesaid its undertaking and all its present and future property, including its uncalled capital for the time being. The conditions indorsed on each debenture provided that the principal moneys should become payable if the company, amongst other things, made default for three calendar months in the payment of any interest, and the registered holder, before such interest was paid, by notice in writing to the company, called in the

principal money thereby secured, or the company should be ordered to be wound up by a Court of competent jurisdiction.

An action was commenced on the 2nd of December, 1891, by *G. P. Fowler* (on behalf of himself and all other holders of first mortgage debentures in the company) against the company and *James Broad*, claiming, (1.) an account of what was due to the Plaintiff, and all other the holders of first mortgage debentures of the company; (2.) to have the first debentures enforced by sale of the property comprised therein; (3.) to have a receiver of the property comprised in the said debentures, and a manager of the undertaking and business of the company, appointed. *Broad* was joined as Defendant because he was the holder of second or B mortgage debentures of the company.

By an order dated the 16th of December, 1891, a receiver and manager was appointed in the action; and he was in possession of all the assets except the uncalled capital at the date of the winding-up order mentioned below being made.

On the 4th of December, 1891, *H. Norman*, a creditor, presented a petition for winding up the company; and on the 16th of January, 1892, a winding-up order was made on this petition.

By an order made in the action on the 23rd of January, 1892, the usual inquiries and accounts were directed, including an inquiry of what the property comprised in the first and second debentures consisted, and what amounts were due on them.

By an agreement in writing, dated the 24th of June, 1892, and made between *C. J. Stewart*, the Official Receiver and provisional liquidator of the company, of the one part, and *Broad* and *Fowler* of the other part, after reciting that *Broad* and *Fowler* were the holders of all the A and B debentures for sums amounting to £35,000 or thereabouts, and that *Fowler* had commenced the above-mentioned action, which was still pending, and reciting the winding-up order, and that questions had arisen or might arise in the winding-up proceedings as to the validity of the said debentures, by way of compromise it was agreed, (1.) that in consideration of certain sums already paid and to be paid by a certain date to the Official Receiver by *Broad*, and of the agreements on his part thereinafter contained, the company or the liquidator acting in the winding-up would not

VAUGHAN WILLIAMS, J.

1893

FOWLER v. BROAD'S PATENT NIGHT LIGHT COMPANY.

commence, take, or prosecute any proceedings, either in the said winding-up, or by action or otherwise, questioning or disputing the validity of, or for setting aside, any of the A or B debentures issued by the company; and (2.) that the sums paid and to be paid by *Broad* as aforesaid should be applied, first, in payment of all the proper costs, charges, and expenses of and incidental to the winding-up, and the costs of the provisional liquidator and Official Receiver of and incidental to the action, and all fees and percentages payable to the provisional liquidator and liquidator and the Board of Trade, and all preferential debts of the company, and, next, in payment to the creditors of the company, other than the debenture-holders, of sums equal to 10*s.* in the pound on the amounts of their respective debts provable in the winding-up; (3.) that the Official Receiver should repay to *Broad* any surplus remaining after the payments aforesaid; (4.) that if the money paid by *Broad* was insufficient for the purposes aforesaid, he would on demand pay the Official Receiver the amount of such deficiency; (5.) that certain receipts should be accepted in satisfaction of certain specified debts; and (6.) that the Official Receiver should, if necessary, forthwith apply to the Court or to the committee of inspection in the winding-up for the approval of the agreement.

This agreement was approved by the committee of inspection on the 1st of July, 1892.

By the certificate of the Chief Clerk, made in the action on the 24th of June, 1892, and filed on the 4th of July, 1892, it was found that a sum of £32,364 1*s.* 11*d.* was due on the first debentures, and a sum of £5601 7*s.* 4*d.* on the second debentures. The certificate also found that *Fowler* and *Broad*, between them, were the holders of all the first debentures, and also the holders of all the second debentures, and that the property comprised in the debentures consisted of (*inter alia*) certain leasehold hereditaments, letters patent, and trade-marks, and "uncalled capital, being 19*s.* on each of 3000 shares, amounting to £2850."

A few of the shares were held by the signatories to the company's memorandum of association, and the remaining shares were held by *Fowler*, *Broad*, and *T. G. Driver*, in about equal proportions.

All the sums payable by *Broad* under the agreement were duly paid by him to the Official Receiver, who thereout paid the costs, fees, debts, and other sums payable under the agreement.

The property comprised in the debentures, with the exception of the uncalled capital, and book debts not exceeding £1500, was sold, and the proceeds of sale were paid into Court to the credit of the action, leaving a deficiency of over £24,000 due to *Fowler* and *Broad* on the first debentures.

The property (other than the uncalled capital) comprised in the debentures being insufficient to pay the full amount due on the debentures, *Fowler* applied to the Official Receiver to make a call, and, on his refusing to do so, took out a summons in the debenture-holders' action that the Defendant company, by the Official Receiver, should make a call, upon all the persons appearing on the share register to be members of the company, of 19*s.* on each share, and that the receiver in the action should get in and receive the amounts due in respect of the shares other than the shares held by *Fowler* and *Broad*, and if necessary take proceedings for the purpose in the name of the company.

The application was supported by an affidavit of the Plaintiff, setting out the facts and giving the names of the shareholders.

The Official Receiver filed an affidavit in which he (*inter alia*) stated the circumstances under which he alleged that the debentures were issued, and that, during the negotiations leading to the compromise, it had never been suggested that any list of contributories should be settled, or that any call should be made; that no steps to settle the list were taken; that if any such claim had then been made by the Plaintiff and the Defendant *Broad*, he should have objected to make a call for their benefit; and that, while as liquidator he was willing that a compromise should be arrived at to avoid litigation, he should have declined, and, so far as the Court should be of opinion that he had any discretion in the matter, he still declined, to take any step, or allow any step to be taken in his name, which involved the recognition of the validity of the debentures; that he agreed not to impeach the validity of the debentures, but did not agree to do anything to support or enforce them; and that, if the compromise was to be reopened, and further steps were to be taken in the winding-up,

VAUGHAN WILLIAMS, J.

1893

FOWLER v. BROAD'S PATENT NIGHT LIGHT COMPANY.

he was of opinion that further inquiry should be made relating to the promotion or formation of the company.

The Registrar adjourned the summons into Court; and it was heard by Mr. Justice *Vaughan Williams* on the 16th of January, 1893.

J. G. Wood, for the Applicant:—

The effect of the agreement is that the first debentures are an undisputed first charge on the uncalled capital of the company, and the holders of them are entitled to have the total amount of 19*s.* due on each share called up. The shares are practically all held by *Fowler*, *Broad*, and *Driver*; but in respect of those held by *Fowler* and *Broad*, the amount of the call need not be paid, but can be set off against the amounts due to them on the debentures. The effect will be that *Driver* will have to pay the £950 due on his 1000 shares. The company, having gone into liquidation, is now represented by the Official Receiver and liquidator thereof, and he should be directed to bring an action for the amount due from *Driver*, or the receiver in the action should be allowed to sue for the call in the name of the Official Receiver and liquidator.

The Court may appoint a receiver, and either order the directors to make calls and pay the proceeds to him, or may order the receiver himself to make the calls: *In re Phœnix Bessemer Steel Company* (1).

[VAUGHAN WILLIAMS, J.:—That was in the winding-up, not in a debenture-holder's action.]

In this case a receiver has been appointed in the action; and, as the winding-up does not prejudice the right of the debenture-holders as secured creditors, they have the right to have the calls collected by the hand of the receiver in this action.

Muir Mackenzie, for the Official Receiver:—

It is no part of the Official Receiver's duty to make a call in this case. He agreed not to take proceedings to invalidate the

(1) 44 L. J. (Ch.) 683.

debentures, but not to help to realize the security. The agreement was entered into with a view to ending the liquidation.

[VAUGHAN WILLIAMS, J.:—The agreement could not mean that the debentures should be treated as valid only for a particular purpose.]

But the summons asks that the Official Receiver may be ordered to make a call. To do this he would have to make out a list of contributories, give notice of the time fixed for settling it, and comply with all the other requirements of the statutes: *Companies Act*, 1862, s. 98; *Companies (Winding-up) Act*, 1890, s. 13. When the list has been settled, the Official Receiver cannot make a call without the sanction of the Court or of the committee of inspection: Rules 92 and 93 of 1890. Making a call is not, therefore, a merely ministerial act on the part of the Official Receiver, and he ought not to be ordered to make the call in the winding-up.

[VAUGHAN WILLIAMS, J.:—He is not asked to do so: he is asked to make the call in the action.]

He is no party to the action. No doubt the company is; but the company could only make a call by a resolution of its directors, and their powers came to an end on the making of the winding-up order, and are not, so far as making calls is concerned, vested in the liquidator.

Sect. 95 of 1862, and sect. 12 of 1890, vest certain powers in the liquidator; but they can only be exercised in the winding-up.

[He also cited *In re Pyle Works* (1).]

Swinfen Eady, and *Peterson*, for *Broad*.

VAUGHAN WILLIAMS, J.:—

Sect. 102 of the *Companies Act*, 1862, and sect. 13 of the *Companies (Winding-up) Act*, 1890, and the rules made under the latter section, shew, that after a winding-up order has been made, the liquidator may make calls on the contributories on the list, to the extent of their liability, to satisfy the debts and liabilities of the company.

(1) 44 Ch. D. 534.

VAUGHAN WILLIAMS, J.

1893

FOWLER v. BROAD'S PATENT NIGHT LIGHT COMPANY.

There cannot be two concurrent modes of making a call—one by the constitution of the company, and the other by the liquidator. The former comes to an end when the company goes into liquidation. The uncalled capital being validly charged by the debentures, the debenture-holders are entitled to an order which will enable them to enforce their charge. Mr. *Wood* is, therefore, substantially right in his contention here. But I will take time to consider in what form the order shall be made.

1893. Jan. 26. VAUGHAN WILLIAMS, J.:—

I have looked into this matter, and have satisfied myself that I have no jurisdiction to make the order asked for in the debenture-holders' action. I have already said that, according to my view, the Applicant will ultimately be entitled to have a call made for the benefit of the debenture-holders.

Having regard to what has passed between the debenture-holders and the liquidator, the Plaintiff is entitled to have the assistance of the liquidator in making these calls so as to get in the uncalled capital; but I do not see any power in me to make the order on an application in the debenture-holders' action. I am clear that the moment you have got a liquidation the call-making power is limited to the statutory power of making calls in a winding-up, and that the original power of the directors to make calls *ipso facto* comes to an end.

The only way in which I can give effect to the rights of the debenture-holders, with regard to the uncalled capital, is by means of an application in the winding-up; but, after what I have said, I do not anticipate the liquidator will object to the application being amended by intituling it in the winding-up, as well as in the action. The liquidator must take the proper steps for making the call and enforcing it, and the Applicant must give him a sufficient indemnity. It may be that the agreement of compromise sufficiently provides for the payment of any costs to be received by the liquidator; if not, the form of indemnity must be settled in Chambers.

By consent, it was subsequently ordered that, as the Official Receiver was represented in this matter by the solicitor employed

by *Driver*, the proceedings to enforce the call should be conducted by the receiver in the action.

VAUGHAN WILLIAMS, J.

1893

FOWLER v. BROAD'S PATENT NIGHT LIGHT COMPANY.

Solicitors for Applicant: *Faithfull & Owen.*
Solicitor for Official Receiver: *James White.*
Solicitors for *Broad*: *Coode, Kingdon, & Cotton.*

F. E.

In re PIONEERS OF MASHONALAND SYNDICATE.

VAUGHAN WILLIAMS, J.

[00202 of 1892.]

1893

Jan. 26.

Company—Winding-up—Ground for Petition—"Just and Equitable"—Ultrà vires act—Issuing Shares at a Discount—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *s.* 79, *sub-s.* 5 [*Revised Ed. Statutes, vol. xiv., p.* 220].

The fact that shares in a limited company have been issued at a discount is not a ground for making a winding-up order on the petition of a fully paid-up shareholder—even where, if the amounts unpaid on the shares were called up, there would be a surplus to be divided among the members of the company.

The remarks of Lord *Herschell* in *Ooregum Gold Mining Company of India* v. *Roper* (1) explained.

A PETITION was presented by a fully paid shareholder in a company called the *Pioneers of Mashonaland Syndicate, Limited.*

The petition alleged that the company was in August, 1891, incorporated under the *Companies Acts*, 1862 and 1890, as a company limited by shares; that its nominal capital was £50,000 divided into 48,000 ordinary shares and 2000 founders' shares, respectively of £1 each, of which about 25,000 of the ordinary shares and 1200 of the founders' shares had been issued, and that the Petitioner was the holder of 2000 ordinary shares and of 890 founders' shares, all credited as fully paid up.

Pars. 6–10 of the petition were as follows:—

"6. It has recently come to the knowledge of the Petitioner that the company has issued, or purported to issue, over 10,000 ordinary shares to persons who were the holders of shares in the *New Mashonaland Exploration Company, Limited*, in liquidation, and received for each £1 share the sum of 3*s.* and a transfer of

(1) [1892] A. C. 125, 142, 143.

VAUGHAN WILLIAMS, J.

1893

In re PIONEERS OF MASHONALAND SYNDICATE.

an equal number of shares then held by such shareholders in the said *New Mashonaland Exploration Company, Limited*, which were of no value whatever.

"7. The company is insolvent and unable to pay its debts.

"8. The assets of the company are of considerable value, and, if prudently realized, would be sufficient not only to pay and satisfy the company's debts and liabilities, but to pay a substantial dividend to the members.

"9. Your Petitioner and other shareholders of the company have been greatly prejudiced by an issue of the shares at a discount, as mentioned in paragraph 6 of this petition.

"10. In the circumstances, it is just and equitable that the company should be wound up."

And the Petitioner prayed that the company might be wound up by order of the Court.

Dunham, for the Petitioner:—

The effect of clauses 7 and 8 of the petition is to state that, if the assets of the company are properly realized, a surplus will remain for the shareholders after the debts have been paid. "Insolvent" only means commercially insolvent.

Issuing the shares at a discount was an act *ultrà vires* the company, and the Petitioner is entitled to have the assets realized in a compulsory winding-up: *Ooregum Gold Mining Company of India* v. *Roper* (1).

Bramwell Davis, for the company:—

The petition states that the company is insolvent, and that the Petitioner is a fully paid-up shareholder; and the petition is therefore demurrable. The Petitioner cannot now ask for a winding-up order on the ground that the company is solvent.

If the transactions complained of were *ultrà vires*, a winding-up petition is not the proper method of impeaching them: *In re Irrigation Company of France* (2); *In re Diamond Fuel Company* (3); *In re Rica Gold Washing Company* (4). In such a case the proper remedy is by an action.

(1) [1892] A. C. 125.
(2) Law Rep. 6 Ch. 176.
(3) 13 Ch. D. 400.
(4) 11 Ch. D. 36.

Dunham, in reply:—

If the *ultrà vires* act were still *in fieri*, an action could be brought to prevent the directors from carrying it out. But where, as in this case, the act complained of has been actually done, Lord *Herschell's* judgment in *Ooregum Gold Mining Company of India* v. *Roper* (1) shews that the persons to whom the shares have been issued at a discount can only be made to pay up in full by means of a winding-up.

It has never been laid down absolutely that the fact of an act *ultrà vires* having been committed is not a ground for a winding-up petition.

VAUGHAN WILLIAMS, J.:—

This is a petition by a shareholder, the holder of fully paid-up shares in the company, who by his petition states that the company is insolvent. If he meant by that that it was legally insolvent, and unable to pay its debts now and in the future, I should say that he had no interest, as by his own shewing nothing would come to him if a winding-up order were made. But it is now said that clause 7 of the petition does not mean that, but only that the company is insolvent in the sense that it is unable to pay its debts as they become due, and that, if clause 7 be read in conjunction with clause 8, the proper inference is that the company, though unable to pay its debts now, will on the realization of its assets have sufficient to pay its debts and leave a surplus. I am inclined to think that I ought to take that view of the meaning of the petition, and I dispose of the case upon that view; but even if the Petitioner has that part of the case decided in his favour, he has not, in my opinion, any right to the order which he asks for. His counsel, in argument on his behalf, admits that the only ground upon which he can support his petition is under the "just and equitable" clause of sect. 79 of the *Companies Act*, 1862. In my opinion, it is not just and equitable that a compulsory order should be made to wind up the company. It was very fairly admitted in argument that it would not be just and equitable that I should make

(1) [1892] A. C. 142, 143.

VAUGHAN WILLIAMS, J.

1893

In re PIONEERS OF MASHONALAND SYNDICATE.

the order if the Petitioner was complaining of a matter which could be dealt with by the ordinary tribunals, on ordinary process, at his instance. It was admitted that if this were merely a case where the directors of the company were going to do something which was *ultrà vires*, the Petitioner could not come here and ask for a winding-up order for the purpose of preventing them from doing that, and it was objected that the Petitioner must not apply to the Court for the extraordinary remedy of a winding-up order because he had a remedy by an ordinary action. In answer to that, it is said that the right which the Petitioner seeks to enforce is one which he can only enforce by means of a winding-up order. The Petitioner says that certain shares of the company were issued at a discount, and that although, as between the company and the shareholders to whom the shares were issued, the company could not insist on the difference between the actual amount and the nominal amount of the shares being paid up, yet, if a winding-up order were made, the result would be that those to whom the shares had been issued would be placed on the list of contributories, and made to pay up the difference, and thus a fund would be created which would be available—in the first place for the creditors, and secondly, in case of there being a surplus, for the shareholders. And it was contended that the Petitioner had an interest in that contemplated surplus, and, therefore, an interest justifying the presentation of his petition to have the company wound up, as the only means by which he could obtain payment. In my judgment, he has no such right. His right is the same in relation to the matter as that of the company; and though it is true that he might have an interest in the surplus, that is a right which only arises when a fund has been created really for the benefit, in the first instance, of the creditors, and secondly, to the extent of the surplus, for the benefit of the shareholders. The contrast drawn by Lord *Herschell* in *Ooregum Gold Mining Company of India* v. *Roper* (1) is not a contrast between a company which is now a going concern and a company in liquidation. The contrast which he draws is a contrast between the rights of a company and the rights of the creditors of a

(1) [1892] A. C. 125.

company. Lord *Herschell* is there really saying that the company has no right to enforce payment of the difference between the amount paid and the full amount of the shares, but that its creditors have such a right. That being so, and there being no rights of creditors in question at all in the present case, the only rights are those of the shareholders; and, resting the case on Lord *Herschell's* judgment, a shareholder has no more right to come and enforce by petition this liability of the shareholder to whom shares have been issued at a discount, than he had in that case to enforce it by an action. The petition must be dismissed with costs.

Solicitor for the Petitioner: *B. F. Linnett.*
Solicitors for the Company: *Munk & Adie.*

F. E.

WRIGHT, J.

1893

Jan. 19, 20, 21, 23, 24, 25, 26, 27.

MORLEY *v.* LOUGHNAN.

[1891 M. 2075.]

Undue Influence—Confidential Relationship—Gift inter vivos—Setting aside.

L., a man of no means, and a member of a religious sect known as Exclusive Brethren, was employed as travelling companion to *M.*, an epileptic subject of large fortune. While so employed he converted *M.* to his own religious views, and in consequence of such conversion *M.* left his home, and took up his residence with *L.*, with whom he continued to reside in great seclusion for the last seven years of his life. During this period *M.*, who was in a low and morbid condition, consulted *L.* on spiritual and temporal matters, allowed him to regulate his diet and his medicine, and placed nearly the whole of his fortune at his disposal. *L.* endeavoured to suppress all evidence of his monetary dealings with *M.* The aggregate amount obtained by *L.* from *M.* was £140,000:—

Held, that the money had been obtained by the actual exercise of undue influence under the guise of religion, and ought to be refunded.

Semble, the money could be recovered also on the ground of confidential relationship.

THIS action was brought by *S. Hope Morley* and *Arnold Morley*, as executors of the will of their brother, *Henry H. Morley*, to recover sums exceeding in the aggregate £140,000, given by the testator in his lifetime to the Defendant, *William Haviland Loughnan*, on the ground that the money had been obtained by undue influence.

Loughnan, who was a married man with a young family, had no means of his own. He was at one time a curate of the Church of *England*, but in 1881 he gave up his curacy and joined the *Plymouth* Brotherhood. This religious sect was divided into two orders—open Brethren and close or exclusive Brethren. *Loughnan* belonged to the close order.

It was the custom of close or exclusive Brethren to isolate themselves from general society, and even to some extent from the members of the other division of the sect. They professed to give up the world and to devote their lives to the service of the Lord.

Henry Morley was the son of the late *Samuel Morley*, a member of the firm of Messrs. *J. & R. Morley*, warehousemen, and he

became entitled through his father to a fortune amounting to £170,000.

He was born prematurely in 1851; he was subject to epileptic fits; he was never at any time of his life physically or mentally strong; he was not, however, incapable of managing his own affairs. At the age of twelve he attended some revivalist services held in *London* by a Mr. *Denham*, who was a *Plymouth* Brother, and was much impressed by them, and eventually he became a member of the open order of that sect.

In consequence of the feeble state of his health his father sent him into the country to learn farming instead of training him for one of the learned professions, and in 1870 he bought an estate near *Tonbridge*, called *Hall Place*, and entrusted to his son the management of the farms in connection with the estate. In the winter of 1880–1881 *Henry Morley* went abroad for his health, and was accompanied by a Mr. *Battersby*, whom his father had engaged as travelling companion.

In November, 1881, *Loughnan* was introduced to Mr. *Samuel Morley* by his son-in-law, Mr. *Washington*, and was engaged by him to act as travelling companion to his son *Henry* for three months, at a salary of £100 and travelling expenses; and in January, 1882, he was retained to act as travelling companion when required at a salary of £400 a year.

On the 8th of May, 1882, Mr. *Samuel Morley* wrote to *Loughnan*: "We have had a pleasant happy visit from your patient, and feel that we owe much to your kind loving care of him. I am so thankful to think you are studying his case, and shall be glad to be helped by you in deciding his future."

In September, 1883, *Henry Morley* invited himself to stay with *Loughnan*, who was then living at *Shoreham*, and from that time until his death in 1891, except for occasional intervals, generally of short duration, when he was alone, and occasional visits to his relations, he continued to reside with the *Loughnan* family at various places, first at *Shoreham*, then at *West Ham* near *Basingstoke*, and, finally, at *Bowden Derra* in *Cornwall*.

On the 11th of October, 1883, he wrote a letter to a Mr. *Hurditch*, with whom he was intimately acquainted, in which he announced his intention of finally leaving his home. The letter

WRIGHT, J. 1893 MORLEY v. LOUGHNAN.

began by lamenting that for many years he had lived out of communion with the Lord, and relating how the Lord had shewn him something of his miserable condition until, as he said, he got so low and dejected that he almost doubted his salvation. The letter then continued: "It was on Monday the 1st inst. that He gave me complete deliverance by first enabling me to look away to Him. I felt so happy; and then I prayed that at whatever cost he would restore my soul and give me to enjoy full communion with Himself. The answer came as plainly as though a man was speaking to me—yes, far plainer—I must give up all and that He would do it all for me. He has done this, and now *Hall Place*, with its costly expenditure, is no longer my home, for I seek but cannot find Jesus there."

After an ineffectual attempt on the part of Mr. *Hurditch* to induce his friend to alter his determination, he communicated what had taken place to Mr. *Samuel Morley*, who had an interview with *Henry*, which was equally ineffectual. After this interview Mr. *Samuel Morley*, on the 1st of November, 1883, wrote to *Loughnan*, expressing his sorrow at the change in his son's views, and suggesting that the change had been brought about by the influence of others, and he continued: "*Henry* told us that one of the first steps in the process by which he has arrived at the conviction that it is his duty to leave home and take up his abode under your roof was a remark you made during one of your early visits to *Hall Place*, 'Can there be Christ with all this?'"

The writer complained that the use of such words by *Loughnan* at that time was a departure from a solemn pledge which he had given to Mr. *Washington* prior to his engagement as companion, that he would not on any occasion make any reference with *Henry* to the peculiar views held by Christians known as exclusives, and he enclosed the sum of £40, the sum then due to *Loughnan* for his services, and requested that all further intercourse might cease.

Loughnan replied on the 3rd of November to the effect that his only promise was to "avoid argument about any differences of opinion which might exist between (so-called) close and open Brethren." "But," he continued, "I remember very well adding,

that if your son was led into what I believed to be true, I should be very thankful."

Samuel Morley replied on the 8th of November that he was extremely dissatisfied with *Loughnan's* explanation; and on the 10th of November *Loughnan* wrote: "I can quite see from your point of view that my action must seem very bad; but it appears from what you say that both you and Mr. *Washington* were in some fear when the engagement between us was first contemplated that your son might be led to adopt the views held by those with whom I am in fellowship; while I, hearing what a bad state of health your son was in, only supposed that the avoiding of argument was on account of his condition." And he added, "He is older than I am, and has been in the narrow way longer than I, and is quite capable of holding his own in religious discussions." He admitted that he had made use of some such expression as that which was attributed to him, and that, on being pressed by *Henry Morley*, he had explained the grounds upon which exclusives gathered. In reference to *Henry Morley's* determination to leave his family, he said: "I do not at all know that he will be led to make this house his home; but as long as he does so his health and happiness will be carefully looked to."

On the 5th of November, 1883, *Henry Morley* wrote a farewell letter to his uncle and aunt, Mr. and Mrs. *John Morley*, to whom he was particularly devoted. Notwithstanding that he had made up his mind to leave his home, he always remained on affectionate terms with the members of his family, although his religious views precluded him from mixing much in their society.

About this time he joined the close order of *Plymouth* Brethren and became a regular attendant at the religious meetings of that order. He also severed his connection with several charitable institutions in which he had formerly interested himself, on the ground, as he stated in one of his letters, that such institutions, being of man's origination, were not after the mind of God, and in several letters he expressed his gratification to the Almighty for having revealed to him the truth, and justified his refusal to hold fellowship with those who were not living in the truth. He also commenced to make large payments to *Loughnan* without demanding or receiving any account, and in fact from this time

WRIGHT, J. 1893 MORLEY v. LOUGHNAN.

forward he placed his banking account at *Loughnan's* disposal. Throughout the whole of this period he was in a low and morbid condition, and was subject to great mental depression induced by excessive doses of bromide, which he took as a remedy for epilepsy; he was frequently under medical treatment.

In May, 1884, he instructed his family solicitors, Messrs. *Phelps, Sidgwick, & Biddle,* to prepare a will under which the *Loughnan* family were to receive legacies amounting to £8000, and this will was executed in June, 1884. In July, 1885, he executed another will, by which the benefits to the *Loughnan* family were increased to £15,000.

Many of the events which occurred after this date were disputed by *Loughnan*; but the net result of the evidence is shortly as follows:—

While *Henry Morley* was living with the *Loughnans* at *Shoreham,* he became acquainted with a Mr. *Dalby* and his daughter, who were members of the same religious order as himself, and, as they became more intimate, he began to conceive an affection for the lady. In 1886 *Loughnan* frequently remonstrated with Miss *Dalby* on her growing influence over *Henry Morley,* and warned her that he had been forbidden by medical men to marry, and in the result she gave him her promise that she would not encourage Mr. *Morley's* attentions, and she never saw him again.

In September, 1886, *Samuel Morley* died, and *Henry* became entitled, under his father's will, to a very large fortune.

Although he had notice of his father's death he did not attend his funeral; but this was explained by *Loughnan* by the fact that at that time he was under treatment in a hydropathic establishment in the *Riviera.* After his father's death the amount which he drew from the business of Messrs. *J. & R. Morley* immediately began to increase. In 1884 and 1885 his drawings were under £3000 per annum; but in 1886 they amounted to £6150.

In the spring of 1887 he moved with the *Loughnan* family to *West Ham,* near *Basingstoke.*

In April, 1887, he wrote to Mr. *Sidgwick,* with reference to some contemplated alteration of his will, a letter in which he complained of momentary attacks of loss of consciousness and

nearly total loss of memory, and inquired whether, in the event of his getting so much more under the power of the disease as to render it necessary that he should be placed under supervision, he could at once nominate a person whom he knew to be willing to undertake the charge, meaning *Loughnan*.

Eventually a codicil was prepared by Messrs. *Patey & Warren, Loughnan's* solicitors, and was executed in November, 1887. By this codicil *Henry Morley* bequeathed to *Loughnan* and his wife a life interest in a moiety of his patrimony.

The excessive amounts which he now began to draw from the business caused some inconvenience to his brothers, and on the 30th of June, 1887, they obtained from him an undertaking not to draw out more than £6000 in any one year. However, on the 15th of July, 1887, he drew out in one sum £12,000, which was paid straight into *Loughnan's* account at *Coutts's*, and was applied by him in the purchase of the house at *West Ham* which he had previously rented.

In March, 1888, *Henry Morley* gave instructions to Messrs. *Patey & Warren* to draw a new will. In a letter of the 25th of April, 1888, acknowledging the receipt of the draft will, he wrote: "As one or two clauses need slight alterations, about which I wish to consult Mr. *Loughnan*, who has gone to the South of *France*, I must await his return in about a fortnight."

This will was executed on the 27th of August, 1888. By it he bequeathed one moiety of his residuary estate in trust for *Loughnan* absolutely.

In May, 1888, his mother died, but he did not attend her funeral.

On the 19th of December, 1888, *Loughnan* wrote to one *Bennett*, a doctor, as to the mental condition of one of his brothers who was under Mr. *Bennett's* care: "He seemed to have started a fresh delusion, and asked me about my accounts. He appears to fancy I am in some degree dependent upon a man he knows of the name of *Morley*, who lives a good deal with me, and has woven some tangle out of our connection."

Early in 1889 *Henry Morley* stayed for some weeks at a hydrotherapeutic establishment at *Bristol*. Dr. *Spoor*, the resident physician who attended him, deposed that he was suffering from

WRIGHT, J. 1893 MORLEY v. LOUGHNAN.

religious depression, and that on one occasion he (*Morley*) told him that he relied upon *Loughnan* to manage his affairs, as his health was not sufficiently good to allow him to attend to them himself. Witness also deposed to a conversation he had had with *Loughnan* as to the nature of *Henry Morley's* complaint, in the course of which *Loughnan* said that he had studied his case very carefully, and thought he understood him thoroughly, and that *Morley* was often guided by his advice in preference to that of his medical attendant.

Loughnan was in the habit of giving directions as to what *Henry Morley* should eat; he also frequently visited his bedroom in the morning, and gave him medicine when he felt unwell.

In July, 1889, *Loughnan* sold the house at *West Ham* for £10,000—a loss of £2000; and later in the same year he went with his family and *Henry Morley* to reside at *Bowden Derra*, a very secluded place, five miles from *Launceston*, in *Cornwall*.

At *Bowden Derra*, *Henry Morley* saw no society at all outside the *Loughnan* circle with the exception of a few poor people whose wants he relieved.

In January, 1890, one *Maxted*, who had known *Henry Morley* before he went to reside with the *Loughnans*, wrote to him asking permission to renew the acquaintance. *Maxted* was a *Plymouth* Brother, though not a member of the close order of Brethren, and he had formerly been concerned in evangelizing work at *Bowden Derra*.

In reply to his letter *Henry Morley* wrote on the 22nd of April, in effect, that his religious views would prevent him from holding fellowship with him.

On the 20th of May, *Maxted*, who was then evangelizing in *Devon* and *Cornwall*, again requested a meeting. To this *Morley* replied on the 21st of May to the effect that he did not feel free to invite him to *Bowden Derra*, as he was staying with friends.

These two letters of the 22nd of April and the 21st of May were drafted by *Loughnan*.

Later in the same year *Loughnan* wrote a business letter for *Morley*, which the latter signed, relating to the sale of some shares in the *National Liberal Club*.

Loughnan, however, asserted in his evidence at the time that

he never discussed business matters with *Henry Morley*, and that his conversations with him were confined to questions of religion.

In the summer of this year *Henry Morley* was particularly depressed about the state of his health, and in July he wrote to his uncle a very gloomy letter, in which he said, "It is not epilepsy I suffer from, but catalepsy."

On the 9th of September, 1890, *Loughnan* wrote to his bankers at *Brighton*: "Mr. *Morley*, who draws the cheques which I usually forward to you, complains to me that though he purposely makes them payable to bearer, they generally have my name on the back of them when they are returned to him. . . . Would you kindly see that neither the enclosed draft, nor any other drawn by Mr. *Morley* and sent by me to your bank, has any name written upon it, as it might prove very inconvenient in arranging certain matters which we have in hand."

On the 8th of October *Henry Morley* drew from the business of Messrs. *J. & R. Morley* £10,000, which at once passed into *Loughnan's* account, and was sent by him to his bank at *Brighton* in a letter containing the following request: "Mr. *Morley* begs me to ask that no name or stamp should be placed on the cheque."

On the 8th of January, 1891, *Henry Morley* wrote to his brother *Hope* announcing his intention of drawing out from the business the bulk of his capital, which then amounted to £70,000. He said: "I have determined to withdraw the bulk of it (as and when most convenient to the firm) in order that during my lifetime I may enjoy the pleasure and privilege of helping in a substantial way such objects as I am led to consider need support, and thus in a feeble way be enabled to realize that I am doing the will of Him that loved me and gave Himself for me (Luke xviii. 29, 30). Neither my friend with whom I am living nor my relations have need of money, and I am therefore all the more happy in taking this step." Then, after stating that he intended to leave £20,000 in the business, he continued: "The rest I propose to lay out anonymously in various objects which I wish to help."

After a vain remonstrance from his brothers the money was paid by three cheques of £25,000, £15,000, and £10,000, received by *Henry* on the 16th, 23rd, and 24th of January. On the 15th

WRIGHT, J. 1893 MORLEY v. LOUGHNAN.

of January, *Loughnan* having left *Bowden Derra* for two or three days, *Henry Morley* gave instructions to Messrs. *Patey & Warren* for a new will, under which his residuary estate was to go to his brothers and sisters.

On the 16th of January he wrote to *Maxted*: "I am almost out of my mind, if not quite. I have no money now. The sad reason you will know in a few days. I hope I shall be forgiven for spending so much upon the workmen in *Basingstoke* two years ago. I cannot do it now. You will know all about it very soon. I am more to be pitied than you are." On the 17th of January *Loughnan* returned to *Bowden Derra*. On the 18th *Henry Morley* wrote a second letter to *Maxted* to the following effect: "I would ask you to burn the letter I sent you last week and forget it, as I wrote it amidst great confusion. I enclose you a cheque for £5. I am glad to say I have nothing sad to communicate. I cannot now upon reflection say I spent anywhere more than I should have done, except when I was in the world."

To this was added a postscript: "I may say I have spent nothing and done nothing in *Launceston*."

On the same day *Loughnan* wrote to Messrs. *Patey & Warren* a letter for *Henry Morley*, which was signed by the latter, as follows: "Do not act upon my letter of last week until you hear further," and on the following day *Henry Morley* wrote that he thought it better that the will should be prepared by his family solicitors. On the 20th of January £25,000 was paid to the credit of *Loughnan's* account, and on the 24th of January a second sum of £25,000 was paid in.

On the 30th of January *Henry Morley* executed his last will, which had been prepared by Messrs. *Phelps, Sidgwick & Co.*, whereby, with the exception of his papers and furniture at *Bowden Derra*, which he gave to *Loughnan*, he bequeathed the whole of his remaining property to his brothers and sisters.

On the 19th of February he wrote to his brother *Hope* that he was in a very weak state of health, and that the doctors threatened paralysis. He then said: "No more love and kindness could possibly have been shewn me by any one than I have experienced always from my dear friend, Mr. *Loughnan*, as well as from every member of his family." Then later on he said, "My chief

object in writing to you is to ask you to promise me that in the event of my becoming helpless in mind or body I shall not be removed from the care of my friend *Loughnan*. I know he will do all that is best for me, and he has kindly opened a joint banking account with me so as to meet any expenses arising from my illness, should I be unable to write."

On the 25th of February *Henry Morley* died by his own hand. During his lifetime he usually spoke and wrote in the highest terms of *Loughnan's* character, but from certain conversations which he had with a Miss *Waterman*, it appeared that towards the end of his life his views at times underwent a change, at any rate in *Loughnan's* absence. Miss *Waterman* was an old lady in feeble health, who had been befriended by the *Loughnans* at *Shoreham*, and had followed the *Loughnan* family to *West Ham* and *Bowden Derra*.

She deposed that in 1888 *Henry Morley* had a conversation with her about a Mrs. *Tolfrey*, whom he had assisted, in the course of which he said he was sorry not to be able to give her more, but he had only a few shillings in his pocket, and could not give her more without consulting Mr. *Loughnan*, and he had given his word not to give more than a few shillings without consulting him. He said he should like to give his money away himself, but he could not continue to live in the house if he continually objected to what they wished. She observed that Mr. *Morley* deferred much to Mr. *Loughnan's* views in almost everything, and this increased as time went on. In the summer of 1890 the deceased was gloomy; he said, "My money goes by thousands; I must take care I do not spend a pound more than I am obliged, because there is a large family—there are two or three or four families in one." This had reference to the fact that *Loughnan* sometimes invited his brothers and his brother-in-law and their families to stay with him.

Witness further deposed that in January, 1891, *Henry Morley* told her, "They do not want me, he has told me to go as soon as I like." He said, "They have had a great deal more money from me than you know anything about—many thousands. There are three cheques that Mr. *Loughnan* urged me to tear out the counterfoils of, because he said they made him liable, if

WRIGHT, J.
1893
MORLEY
v.
LOUGHNAN.

they remained in the cheque-book." He said he had screened *Loughnan* many times from his (*Morley's*) brothers, but could not write to them now. "I am a miserable man; and unless I comply with all they want they make my life miserable." In another conversation in January or February, he said, "They have taken it all. I have never given it to them; they have taken it without my leave." He said that he meant to give some money to some other people whom he named, but could not because they had taken it. He said, "They are swindlers, it is swindling; they have left me with only £700 a year, and that is not enough to take me anywhere else. They have deceived me from the first." Witness further deposed that she went up to the house and saw Mr. *Loughnan* and his wife, and told them part of what the deceased told her, and, in particular, that he said that they had got his money, and he had only £700 a year left; that Mrs. *Loughnan* said, "Plenty, too, for him"; and Mr. *Loughnan* said, "He is very confused about it, a man who does not spend more than £100 a year." Then that the deceased afterwards told her, "It is all true that I have told you," and that on the last time she saw him on the Sunday before he died, he said, "I am so unhappy, they are not kind to me."

At the funeral *Loughnan* was questioned by *Charles Morley*, a brother of the deceased, and Mr. *Phelps*, as to the destination of the £50,000 which the deceased had withdrawn from the business in January. At first he said he was under a solemn promise to the deceased not to divulge the objects for which it was given, but he subsequently stated that he had received and invested it, and that it was given for the relief of the poor, and generally for that form of religious work in which he and the deceased were jointly interested. After some further pressure he admitted that the money had been invested for his private purposes, and offered to leave the matter in the hands of the family. He also made a similar statement to Miss *Waterman* as to the objects for which the money was given. At the trial *Loughnan* denied that he had ever made any such statements, and he swore that the £50,000 had been given to him for his private purposes in lieu of certain benefits which he was to have taken under the will of the deceased.

Among the papers of the deceased (which conveyed singularly little information as to his dealings with *Loughnan*) were found his diary, draft copies of the two letters written to *Maxted* on the 22nd of April and the 21st of May, 1890, several account-books with the leaves torn out, and a cheque-book with the counterfoils torn out. Certain cheque-books of *Loughnan's* were also produced in the same condition. One counterfoil, however, had been preserved, which recorded the fact that on the 16th of February, 1891, *Loughnan* had drawn a cheque for £50 for *H. H. M.* This corresponded with an entry in the diary, "Cheque £50 kindly given to me from common account." This was the account referred to in *Henry Morley's* last letter to his brother. There was also produced a formal receipt, bearing date the 13th of September, 1888, for £150 paid by *Loughnan* to *Henry Morley* as the price of certain bedroom and study furniture at *West Ham* which *Morley* had sold to *Loughnan*, with the view, as he explained in a letter to Messrs. *Patey & Warren*, of simplifying certain testamentary dispositions which he intended to make in *Loughnan's* favour. The receipt was in *Loughnan's* handwriting, and was signed by *Henry Morley*.

The only other document of importance was a pencil memorandum in *Henry Morley's* handwriting: "Letters to go through with *W. L.* before tearing up."

From investigations directed by the Plaintiffs, it appeared that in the last years of his life *Henry Morley* drew from the business the following amounts:—in 1883, £2965; in 1884, £2600; in 1885, £2710; in 1886, £6150; in 1887, £24,700; in 1888, £9950, in 1889, £18,500; in 1890, £15,000; in 1891, £50,000. He also derived about £10,000 from other sources; and £135,000 was actually shewn to have been paid to *Loughnan*.

Mr. *Phelps* repeatedly applied to *Loughnan* for information as to these payments, but *Loughnan* refused to furnish any information on the subject, for the reason, as alleged in one of his letters, that "all such transactions were purely personal and confidential," and, in particular, he declined to give the Plaintiffs any facilities for investigating his banking accounts, of which he kept several, until he received a letter from *S. Hope Morley*, intimating that, though he might have destroyed his bankers'

WRIGHT, J. 1893 MORLEY v. LOUGHNAN.

books, and the counterfoils of his cheque-books, there was no great difficulty in obtaining copies of them from his bankers. He also attempted to prevent Miss *Dalby* and Miss *Waterman* from giving evidence at the trial.

The bulk of the money which *Loughnan* received from the deceased was applied by him partly in living at the rate of £5000 a year and partly in the purchase of investments for his own private use; but he also gave £10,000 to his brother *Alfred*, a similar sum to his brother *Henry*, and £4700 to his brother-in-law *Sleeman*, and he devoted some comparatively trifling sums to charity. At the commencement of this action about half of the money had disappeared.

The action was commenced against *W. H. Loughnan* on the 14th of July, 1891. The Plaintiffs claimed an account of the dealings between the deceased and the Defendant, and payment by the Defendant of all sums obtained by undue means; and, in addition, they claimed an injunction restraining the Defendant from dealing with the £50,000 or the investments representing the same, which they sought to have brought into Court; and, upon motion before Mr. Justice *Stirling*, an order was made in substantial accordance with the latter part of the claim under which the £50,000 was deposited in a bank till the trial.

Subsequently *Alfred Loughnan*, *Henry Loughnan*, and *Sleeman* were made Defendants to the action for the purpose of making them liable to the extent to which they had benefited from the estate of the deceased.

At the trial, the action was compromised as against the Defendant *Sleeman*.

Sir *C. Russell*, A.G., and Sir *J. Rigby*, S.G. (*Haldane*, Q.C., *Ingle Joyce*, and *Reginald Smith*, with them), for the Plaintiffs:—

These gifts ought to be set aside on two grounds; first, because they were the result of influence expressly exercised by the donee; secondly, because the relations between the donor and donee were such as to raise a presumption of influence: *Allcard* v. *Skinner* (1). The mental and physical condition of the deceased, though not amounting to incapacity, was such as to

(1) 36 Ch. D. 145.

render him peculiarly amenable to surrounding influences, and *W. H. Loughnan*, as his travelling companion, was in a position in which his influence might most easily be exercised. From the first, he stood in a position of confidential relationship to the deceased, and that relationship became closer as time went on, and the *onus* is on him to prove the righteousness of these transactions. The banking accounts of the deceased were practically dummy accounts existing for the purpose of being drawn upon by the principal Defendant for his private ends. Even apart from the existence of any confidential relation between the parties, the fact of a wealthy man divesting himself day by day of the greater part of his fortune in favour of a person with whom he resides, is, of itself, almost conclusive as to the exercise of influence. *Res ipsa loquitur*. But here, everything points to the existence of a confidential relation, and, so long as that relation exists, it is impossible for bounty to pass between the parties unless the donor has competent and independent advice, or, at any rate, unless he is in a position to avail himself of such advice. This principle is not affected by the age or capacity of the donor; it depends on public policy: *Rhodes* v. *Bate* (1); *Dent* v. *Bennett* (2); *Lyon* v. *Home* (3); *Mitchell* v. *Homfray* (4).

Charles Gurdon, for the Defendants *W. H.*, *A.*, and *H. Loughnan*:—

The gifts were induced not by any undue influence, but by a legitimate affection. In all voluntary transactions, there is, in the first instance, an *onus* on the donee to prove that the donor understood the transaction, and in that sense it lies upon the donee to satisfy the Court as to the righteousness of the transaction; when that *onus* is discharged, the question arises, whether there exists a confidential relationship between the parties, and if that is established, there is the further *onus* on the donee of shewing either that the donor had independent advice, or was so situated with regard to the donee, as to satisfy the Court that the gift was the intention of a voluntary mind. If no confidential relationship is established the burden of proving undue

(1) Law Rep. 1 Ch. 252.
(2) 4 My. & Cr. 269.
(3) Law Rep. 6 Eq. 655.
(4) 8 Q. B. D. 587.

WRIGHT, J. 1893 MORLEY v. LOUGHNAN.

influence is cast on the donor: *Hoghton* v. *Hoghton* (1); *Hunter* v. *Atkins* (2). In this case, it is not suggested that the donor did not know what he was doing. The only question is as to confidential relationship, and upon that question it has been laid down by Lord *Brougham* in *Hunter* v. *Atkins*, that the jealousy with which the Court watches transactions between persons who stand in some peculiar relationship to each other is diminished as the relationship becomes more vague and ill-defined. For instance, gifts to an attorney, agent, or steward, are viewed with more suspicion than gifts to a confidential adviser. There is not here any such relation between the parties as would prevent the donee from retaining the gifts: *Taylor* v. *Johnston* (3).

In *Dent* v. *Bennett* (4), the ground of the decision was that the transaction was not fully understood by the parties. In *Lyon* v. *Home* (5), it was held not only that a confidential relationship existed, but that it was procured by the fraud of the defendant. In *Allcard* v. *Skinner* (6), the donor was absolutely in the power of the lady superior of the sisterhood.

The benefits which the donee received in this case were in lieu of benefits which he was to have received under the will of the deceased, and it is not suggested that any of the wills could have been set aside, or that the deceased had not independent advice when he made them.

E. R. Simpson, for the Defendant *Sleeman*.

Sir *C. Russell*, in reply:—

The jurisdiction of the Court, according to the statement of Sir *Samuel Romilly* in *Huguenin* v. *Baseley* (7) which has been adopted by Lord *Cottenham* in *Dent* v. *Bennett*, and by other Judges, extends to all the varieties of relationship in which influence may by reason of that relation be exercised by one person over another.

As regards the wills of the deceased, the influence which is undue in the case of gifts *inter vivos*, is very different from that

(1) 15 Beav. 278.
(2) 3 My. & K. 113.
(3) 19 Ch. D. 603.
(4) 4 My. & Cr. 269.
(5) Law Rep. 6 Eq. 655.
(6) 36 Ch. D. 145.
(7) 14 Ves. 273; 2 W. & T. L. C. in Eq. 6th Ed. p. 597.

which is required to set aside a will: *Parfitt* v. *Lawless* (1). The evidence establishes that there was such confidential relationship between the parties as to create influence by the one over the other, and that not only influence but almost an ascendancy was exercised by the donee over the deceased.

1893. Jan. 27 WRIGHT, J.:—

In this case the general nature of the facts is this. The Defendant *W. H. Loughnan* (whom I shall call the Defendant) was a man of no means, and he belonged to a religious sect, one of whose main tenets is to give everything to the Lord. One of his first introductions to the deceased gentleman, Mr. *Morley*, is significant. Seeing Mr. *Morley* surrounded by wealth in his father's house, he said to him, "Can there be Christ, with all this?"

Mr. *Loughnan* was employed as a travelling companion to Mr. *Morley*, who was an epileptic subject of large fortune, and he converted Mr. *Morley* to that sect, received him into his own family, and in the course of six or seven years obtained from him most of his fortune, amounting to about £140,000, and applied it partly in living at the rate of £3000, £4000, or £5000 a year, partly in investments for himself, partly in distribution among his relatives, and a great part, probably half of the whole, has entirely disappeared.

The executors seek to set aside these gifts principally on the ground of undue influence; and it is proper and necessary to say that it was proper and necessary for them to sift this matter to the bottom. In doing so, I think they are actuated by no motives of personal interest whatever.

There is no doubt about the law, which is illustrated by numerous cases collected in *White* and *Tudor's* work under the leading case of *Huguenin* v. *Baseley* (2) and continuing down to the case of *Allcard* v. *Skinner* (3). That law is, that where large voluntary gifts are made and accepted *inter vivos*, the recipient may be called upon to shew that the donor had capacity and knowledge of what he was doing. In this case that capacity

(1) Law Rep. 2 P. & M. 462.
(2) 14 Ves. 273; 2 W. & T. L. C. in Eq. 6th Ed. p. 597. (3) 36 Ch. D. 145.

WRIGHT, J. 1893 MORLEY v. LOUGHNAN.

and knowledge are not disputed. Proof may then be given against the recipient to shew that the donor's intention to give was produced by undue influence, and then the Courts of course set it aside, unless the transaction as a whole was a benefit to the donor.

Or the donor may shew that confidential relationship existed between the donor and the recipient, and then the law on grounds of public policy presumes that the gift, even though in fact freely made, was the effect of the influence induced by those relations, and the burthen lies on the recipient to shew that the donor had independent advice, or adopted the transaction after the influence was removed, or some equivalent circumstances.

Here the Plaintiffs take both grounds. They say there is actual proof of undue influence producing the gifts; secondly, they say there was confidential relationship within the meaning of that rule, and the donor had no independent advice, and there were no equivalent circumstances.

The peculiarity of this case is that it is not one of those ordinary confidential relationships such as solicitor and client, physician and patient, parent and child, or guardian and ward, or religious superior; but it is of a nature which I think is sufficient to bring it within the rule as laid down by Lord *Eldon*, adopting the argument of Sir *Samuel Romilly* in *Huguenin* v. *Baseley* (1), that the rule stands on a general principle applying to all the variety of relations by which dominion may be exercised by one person over another.

What I have to decide is, is there proof of undue influence which produced the gift? and if not, was the relation of that confidential kind which comes within the rule?

The case made by the Attorney-General, especially in his powerful reply, was of this kind. Mr. *Morley* was a man mentally and physically weak, though not incapable; a man impressionable and highly strung, morbidly religious from the age apparently of twelve years, easily influenced, yet wilful and obstinate; a man of no marked strength of character, or mental power. So that when he had reached the age of thirty, his father

(1) 14 Ves. 273.

thought it right to engage and pay travelling companions to take care of him.

One of these companions was the Defendant *Loughnan*, who was travelling with him in the year 1881, and, as the Attorney-General points out, there would be great probability and opportunity of influence of a stronger man, over a weaker, selected as a stronger man for the purpose, and paid to look after him, and, in truth, a kind of guardian, and so treated by the young man's father, who thanks Mr. *Loughnan* for his "kind and loving care" of his patient, and for "studying his case," and "will be glad to be helped by him in deciding his son's future."

During the continuance of that relation as between the father and Mr. *Loughnan*, Mr. *Morley*, the deceased, invited himself to stay with Mr. *Loughnan* in September, 1883, and Mr. *Loughnan* informed his father that so long as Mr. *Morley* made Mr. *Loughnan's* home his home, Mr. *Morley's* health and happiness would be carefully looked to. Shortly afterwards Mr. *Morley* wrote a sort of farewell letter to the world to his uncle and aunt, and from that time until his death in February, 1891, he was one of the family group of the *Loughnans*, seldom away, or only for a few weeks at a time at most, and practically confined to a very narrow circle, both socially and in matters of religion. There is no trace in all that time of his mixing in general society, and his seclusion was, in fact, such that he did not attend either his father's or his mother's funeral. It is only right to say that it is explained at the time of his father's funeral he was under treatment in a hydropathic establishment; but no such explanation is given with regard to his neglect of the respect due to his mother's memory. But those things are only material to shew what the seclusion was. As to what took place during those six or seven years there is little direct evidence, but we know certain things. We know that Mr. *Morley* almost immediately began to give large sums to Mr. *Loughnan*—£2500 the first year, £2700 the next, over £6000 the next, nearly £25,000 in the fourth year, nearly £10,000 in the fifth, £18,500 in the next year, and £65,000 in the last thirteen months, neither receiving nor demanding any account of these sums; and at the same time he was, till the close of the period, making a series of wills

WRIGHT, J. 1893 MORLEY v. LOUGHNAN.

progressively in the Defendant's favour. The very magnitude of these transactions seems, as the Attorney-General said, to raise a presumption of influence or infatuation. We know throughout that period that the deceased was in a low, feeble, and morbid condition, suffering from great depression produced by large and continued doses of bromide of potassium, trouble or loss of memory, and apprehensive at times of catalepsy, paralysis, and even on one occasion, of insanity.

There is abundant evidence that the deceased man when with the Defendant held the highest views of the Defendant's saintly character, and of the debt of gratitude he owed the Defendant, and, till near the end, placed unbounded confidence in the Defendant's religion and integrity, and trusted him to apply the wealth lavished upon him by the deceased to unselfish ends. There is evidence that when absent the fascination seemed to be partially removed, and, towards the end, was once or twice entirely gone, but it returned with his return to the Defendant's care, and I agree with the Attorney-General that that is a strong indication of personal ascendancy when in the presence of the Defendant.

There are some slight but accidental glimpses of the actual relations of the parties during these years. It is proved that in four instances, all of them in 1890, the deceased's letters were drafted by the Defendant, and signed by the deceased.

Now these four instances are very remarkable and very suggestive as regards the motive for the Defendant so interfering, if they are to be regarded as exceptional instances of letters being so drafted. If, on the other hand, they are to be regarded as not exceptional but indicating a general practice by the Defendant to draft the deceased's letters for him, I think it even more remarkable, because Mr. *Morley* was a man perfectly competent to write his own letters for himself on all subjects.

Further, the Defendant took upon himself, I think in 1886, to break off an incipient attachment between the deceased and Miss *Dalby*, whose story I implicitly believe. I think it was given with every indication of truthfulness, and in a manner which did her credit.

We know that Mr. *Loughnan* took upon himself the expendi-

ture of nearly the whole of Mr. *Morley's* money, even down to small sums for personal expenses. One of the wills could not be settled till Mr. *Loughnan's* return from abroad. The deceased's letters were to be gone through and torn up with him. He regulated his food and the medicine. He was accustomed to visit the deceased in his bedroom every morning, and the deceased told one of the doctors that he relied upon Mr. *Loughnan* to manage everything for him. It is evidence not of course of the fact against Mr. *Loughnan*, but of the state of mind of Mr. *Morley* in relation to it.

There is one remarkable piece of evidence which, if believed, goes far to shew that the deceased was in a condition of subjection to an influence against which he was unable to contend, but to the true nature of which his mind became at times so far alive as to shew that the subjection was not wholly voluntary. That was the evidence of Miss *Waterman*, a very elderly lady whose veracity I see no reason whatever to doubt, though I might hesitate to base a judgment entirely on her memory. The value of her evidence so far as belief is this, that she was the only person who from the outside world during all these years gained any admission to the interior of this family while the deceased was there.

[His Lordship then referred to the evidence as to the conversations of the deceased with Miss *Waterman*, which he read not as evidence of the facts against *Loughnan*, but as evidence of Mr. *Morley's* state of mind, and he continued :—]

There are other circumstances also which throw grave suspicion on the conduct and motive of the Defendant and his evidence. First, the absence of records relating to the pecuniary transactions. Hardly anything is produced. The only account-books, I think, or cheque-books produced, have the leaves relating to business transactions, or counterfoils relating to those transactions torn out, in strong contrast to two particular exceptions, where everything has been scrupulously preserved—the transactions in which the deceased might have found his own interest in preserving a record.

Then there is the extraordinary transaction in September, 1890, when large sums are being paid into the banks. Mr.

WRIGHT, J. 1893 MORLEY v. LOUGHNAN.

Loughnan made a request to the manager of one of the banks to take care that no marks or stamps should be placed on cheques paid into his account, by which the transaction might be traced, because it might prove inconvenient for some purpose which he did not explain, and, as the bank manager observed, that was a most unusual request.

Then I find, as a matter of fact, that the Defendant made attempts to prevent Miss *Dalby* and Miss *Waterman* from giving evidence. He refused information as to transactions with his banks to the executors, until it was pointed out to him that the information could be obtained without his consent. Several of his letters relating to the deceased man and his relations with him are of the most disingenuous kind. He denied the truth of the evidence of Miss *Dalby* and Miss *Waterman*, Mr. *Charles Morley* and Mr. *Phelps*, all of whom I fully believe to have been telling the truth in substance, and whatever comment may be made on the difficulty of remembering the exact terms of a conversation, I believe in substance everything they stated took place.

Under the circumstances, the Defendant cannot complain if the most unfavourable inferences are drawn, and I think I ought to draw them. I believe that the money which the executors seek to recover was obtained by the exercise and abuse of personal influence and ascendancy established and maintained for that very purpose, under a cover of religion and religious brotherhood. I believe the Defendant took possession, so to speak, of the whole life of the deceased, and the gifts were not the result of the deceased's own free will, but the effect of that influence and domination. It is, therefore, unnecessary to decide whether the relationship between Mr. *Morley* and Mr. *Loughnan* was of that confidential fiduciary character which brings it within Lord Justice *Bowen's* view in *Allcard* v. *Skinner* (1) as a fetter on his conscience which requires a gift, even though freely made in fact, to be set aside on the ground of public policy, though I should have no doubt that the rule is wide enough to comprehend this case, and does comprehend it.

Then there is another ground on which the Plaintiffs are

(1) 36 Ch. D. 145.

entitled to succeed, as to the £50,000. We have a record of the views with which the deceased drew out this sum in the letter of the 8th of January, 1891. [His Lordship referred to the letter and continued :—]

Besides that, there is proof in the evidence of Mr. *Charles Morley*, Mr. *Phelps*, and Miss *Waterman*, of admissions made by the Defendant to the effect that the money was given—the evidence is in slightly varied terms—in substance for the furtherance of religious objects and religious works, and if the money was given in that way I think that Mr. *Loughnan* cannot repudiate the purpose for which it was given, and claim to take the benefit of it for his own private and selfish ends. There appears to be nothing that would constitute a trust in the strict sense of the word, and there is nothing beyond that letter of Mr. *Morley's* to shew the nature of the objects which he intended. Of course the executors are not in any way bound by the statements of Mr. *Loughnan* on the point. I mention this third ground, because I think it is an independent ground on which, in any case, the Plaintiffs would be entitled to recover the £50,000.

Then there remains the other consideration, and that is the case of the other Defendants. The Defendant, *Charles Sleeman*, is now gone from the case, but the other Defendants appear to be, in the language of Lord *Eldon*, in *Huguenin* v. *Baseley*, where he says (1): "I should regret, that any doubt could be entertained, whether it is not competent to a Court of Equity to take away from third persons the benefits, which they have derived from the fraud, imposition, or undue influence, of others," and he cites Lord Chief Justice *Wilmot* in the case of *Bridgman* v. *Green*: "There is no pretence that *Green's* brother, or his wife, was party to any imposition, or had any due or undue influence over the plaintiff; but does it follow from thence, that they must keep the money? No: whoever receives it, must take it tainted and infected with the undue influence and imposition of the person procuring the gift; his partitioning and cantoning it out amongst his relations and friends, will not purify the gift, and protect it against the equity of the person imposed upon. Let the hand

(1) 14 Ves. 289.

WRIGHT, J. 1893 MORLEY v. LOUGHNAN.

receiving it be ever so chaste, yet, if it comes through a polluted channel, the obligation of restitution will follow it."

For these reasons I think there must be judgment for the Plaintiffs.

Solicitors: *Phelps, Sidgwick, & Biddle; Patey & Warren; Busk & Co.*, agents for *Peter, Launceston.*

H. B. H.

END OF VOL. I.

The Mode of Citation of the Volumes of the LAW REPORTS, commencing January, 2, 1893, will be as follows:—

In the First Series,

[1893] 1 Ch. [1893] 2 Ch. [1893] 3 Ch.

In the Second Series,

[1893] 1 Q. B. [1893] 2 Q. B. [1893] P.

In the Third Series,

[1893] A. C.

INDEX.

ABANDONMENT—Railway—Parliamentary deposit - - - - - 47
See RAILWAY. 1.

ACCOUNT—Partnership—Value of share of deceased partner - - - 391
See PARTNERSHIP. 2.

ACCUMULATIONS—Trust for payment of debts—Settled Land Act—Tenant for life
See SETTLED LAND ACTS. 2. [700

ADEMPTION—Sale of property devised and subsequent reconveyance to testator on mortgage - - - - 214
See WILL. 1.

ADVANCED MEMBERS—Building society—Alteration of rules - - - 377
See BUILDING SOCIETY. 1.

ADVERTISEMENTS—Copyright - - 218
See COPYRIGHT. 1.

APPEAL—Attachment—Contempt—Criminal proceeding - - - - 252
See PRACTICE. 2.

—— For costs—Inquiry as to lunacy - 466
See LUNATIC.

—— For costs—Trustee's costs - - 547
See PRACTICE. 1.

APPORTIONMENT—Capital and income—Profits of mine - - - 292
See TENANT FOR LIFE. 1.

—— Capital and income—Trust for conversion
See WILL. 4. [586

ARBITRATION—*Unfitness of Arbitrator—Injunction—Jurisdiction.*] A contract by which the Plaintiff undertook to construct a dock for the Defendant company provided that any dispute between the company and the contractor as to the meaning of any part of the contract, or as to the quality or description of the materials to be used in the works, should be referred to the company's engineer as arbitrator. A dispute arose whether the contract required the interior of a certain embankment to be made of stone, or whether rocky marl was allowable, so that, if the contractor by the direction of the engineer used stone, he would be entitled to be paid for it as an extra. A correspondence took place between the contractor and the engineer, in which the engineer stated his view to be that the contract bound the contractor to use stone, and that it was not an extra. The company then referred the dispute to the arbitration of the engineer. After this reference, and on the day for which the first appointment had been made, the engineer wrote to the contractor a letter in which he repeated his former view. The Plaintiff brought his action to restrain the company from proceeding further with the arbitration.—Kekewich, J., held, that the last letter shewed that the engineer had finally made up his mind on the point, and was, therefore, disqualified to act as arbitrator, and granted an injunction:—*Held*, on appeal, that, considering the position of the engineer who, as engineer of the company, must necessarily have already expressed an opinion on the point in dispute, his writing after the commencement of the arbitration a letter repeating the same opinion would not disqualify him from acting as arbitrator unless, on the fair construction of the letter, it appeared that he had made up his mind so as not to be open to change it upon argument:—*Held*, by Lindley and Bowen, L.JJ. (dissentiente A. L. Smith, L.J.), that the letter in question did not, upon its fair construction, shew that the engineer had precluded himself from keeping his mind open, and that the injunction ought to be dissolved; and whether there was jurisdiction to grant it, *quære*. JACKSON *v.* BARRY RAILWAY COMPANY - - - C. A. 238

ATTACHMENT—Order to defendant to appear as witness—Personal service—Appeal
See PRACTICE. 2. [252

BANKRUPTCY—Cesser of partnership—Proviso in articles—Appointment of receiver
See PARTNERSHIP. 1. [578

—— Examination—Production of documents—Shorthand notes of examination—Privilege - - - - - 686
See PRACTICE. 4.

BILL OF COSTS—Taxation - - 129, 507
See SOLICITOR. 2, 3.

BILL OF SALE—*Power of Attorney—Bills of Sale Act* (1878) *Amendment Act*, 1882 (45 & 46 *Vict. c.* 43), *s.* 10.] A valid bill of sale may be executed by attorney, and the grantee is not necessarily excluded from being such attorney.—A deed empowered a creditor, on default of stipulated payment by the debtor, to tender to the debtor a bill of sale for execution, and in case of non-execution for seven days to execute the bill as attorney for the debtor. The Court refused to restrain the grantor from putting in force the power. FURNIVALL *v.* HUDSON - 335

BOARD OF TRADE RULES, 1886, r. 22 - 309
See TRAMWAY.

BREACH OF TRUST—Statute of Limitations
See TRUSTEE. 1, 2. [304, 590

BUILDING ESTATE—Restrictive covenants
[195, 342
See VENDOR AND PURCHASER. 1, 3.

BUILDING SOCIETY—*Advanced Member—Mortgage—Proviso for Redemption—Alteration of Rules after Date of Mortgage—Contract of Mortgage and Contract of Membership—Building Societies Act* (6 & 7 *Will.* 4, *c.* 32).] An advanced member of a building society executed a mortgage to the society, with a proviso for redemption on payment of "the several sums, whether consisting of monthly subscriptions, fines, interest, or other payments which, under the constitution of the said society and the rules and regulations thereof," ought to be paid in respect of his shares, and a covenant for payment to the same effect. At the time of the mortgage the rules of the society did not provide for any contribution by advanced members to losses of the society, but subsequently thereto the rules were duly altered by empowering the directors to make a levy on members of a contribution to losses; and under the rules so altered a levy was made. The mortgagor claimed to be entitled to redeem without paying any part of such levy:—*Held*, that although the mortgage did not refer to the rules "for the time being," yet the mortgagor, by virtue of his contract, which was one of mortgage and membership combined, was bound by the altered rules, and was therefore not entitled to redeem except upon payment of his proportion of the levy.—*Wilson* v. *Miles Platting Building Society* (22 Q. B. D. 381, n.), and *Rosenberg* v. *Northumberland Building Society* (22 Q. B. D. 373), considered and applied. BRADBURY *v.* WILD - - 377

2. —— *Winding-up—Transfer of Liquidation—Transfer from High Court to Court without Bankruptcy Jurisdiction—City of London Court—Transfer to High Court of Liquidation of Building Society—Companies (Winding-up) Act*, 1890 (53 & 54 *Vict. c.* 63), *ss.* 1 *sub-s.* 5, 3—*Building Societies Act*, 1874 (37 & 38 *Vict. c.* 42), *ss.* 4, 32—*Order of Lord Chancellor of the 29th of November*, 1890—*County Court Rules*, 1892, *r.* 146.] There is no power to transfer the winding-up of a company to a Court which has been excluded by the Lord Chancellor from having jurisdiction, under the Companies (Winding-up) Act, 1890, to wind up such company:—*Semble*, that, notwithstanding rule 146 of the County Court Rules, 1892, there is no power to transfer from the City of London Court, or any County Court, to the High Court, the winding-up of a society registered under the Building Societies Act, 1874.—*In re London and Suburban Bank* ([1892] 1 Ch. 604) approved. *In re* REAL ESTATES COMPANY 398

BUILDING SOCIETY—*continued.*

CALLS—Power to make—Winding up—Liquidation—Debentures charged on unpaid capital - - - - 724
See COMPANY. 8.

CANAL—*Right of Navigation—Subjacent Mines—Right of Support.*] By a private Act of Geo. 2, the undertakers, who were not made a corporation, were authorized to make an existing brook navigable, and to maintain and use such navigation, and to make such new cuts and canals as might be necessary for the purpose, the undertakers first giving satisfaction to the owners of lands which should be made use of, or prejudiced, or damaged, by the carrying on, effecting, or preserving the navigation, which satisfaction might be by a yearly payment or by a sum in gross. The undertakers were authorized to charge tolls for the use of the navigation, and the public were to have a right to use it on payment of the tolls. No express power to purchase land was given, but persons under disability were empowered to sell. The Act contained no reference to minerals. The brook was made into a canal, but no conveyances to the undertakers were made—compensation being made to landowners by annual payments. The navigation subsequently became vested in the Plaintiffs. The Defendants, who were the owners of coal under the canal, worked it so as to cause a subsidence, and the Plaintiffs brought their action for an injunction on the ground that they had a right to support:—*Held*, by Kekewich, J., that the grant of a right to make and maintain the navigation without any grant of the land did not carry with it a right of support so as to prevent the landowners from working their mines:—*Held*, on appeal, that where an express statutory right is given to make and maintain something requiring support, the statute, in the absence of a controlling context, must be taken to mean that the right of support shall accompany the right to make and maintain; that if the Act does not provide any means of obtaining compensation for the loss occasioned to the landowner by his having to leave support, this is a strong argument against the Legislature having intended to give such right; but that if it contains provisions under which compensation can be obtained, it needs a strong context to shew that the right to support is not given; that under the Act in the present case compensation could have been successfully claimed for the damage occasioned to the landowners by making their mines unworkable; that the Legislature, therefore, must be taken to have intended to give a right of support, and that the Plaintiffs were entitled to an injunction. LONDON AND NORTH WESTERN RAILWAY COMPANY *v.* EVANS C. A. 16

CAPITAL—Application of—Settled Land Act
See SETTLED LAND ACTS. 1. [153

—— Reduction of—Company - - 495
See COMPANY. 4.

CAPITAL AND INCOME — Apportionment — Trust for conversion - - - 586
See WILL. 4.

—— Apportionment—Tenant for life—Profits of mine - - - - - 292
See TENANT FOR LIFE. 1.

CASES—*Bahia and San Francisco Railway Company, In re* (Law Rep. 3 Q. B. 584) explained - - - - - 618
See COMPANY. 6.

—— *Beavan* v. *Beavan* (24 Ch. D. 649, n.) applied
See WILL. 4. [586

—— *Bertram Luipaard's Vlei Gold Mining Company, In re* ([1892] 3 Ch. 332) explained
See COMPANY. 10. [210

—— *Bridges* v. *Garrett* (Law Rep. 5 C. P. 451) distinguished - - - 594
See PRINCIPAL AND AGENT.

—— *Browne* v. *Hammond* (Joh. 210) followed
See WILL. 2. [567

—— *Buckle* v. *Fredericks* (44 Ch. D. 244) followed - - - - - 77
See RESTRAINT OF TRADE. 1.

—— *Burton's Will, In re* ([1892] 2 Ch. 38) considered - - - - 329
See INFANT. 2.

—— *Caloric Engine and Siren Fog Signals Company, In re* (52 L. T. 846) not followed
See COMPANY. 3. [603

—— *Charles* v. *Jones* (33 Ch. D. 80) explained
See PRACTICE. 1. [547

—— *Chesterfield, Earl of, In re* (24 Ch. D. 643) applied - - - - 586
See WILL. 4.

—— *Conway* v. *Fenton* (40 Ch. D. 512) distinguished - - - - 153
See SETTLED LAND ACTS. 1.

—— *Courtier, In re* (34 Ch. D. 136) reluctantly followed - - - - - 61
See TENANT FOR LIFE. 2.

—— *Cradock* v. *Piper* (1 Mac. & G. 664) considered - - - - 129
See SOLICITOR. 3.

—— *Croft, In re* ([1892] 1 Ch. 652) distinguished
See REVENUE. [188

—— *Donaldson, In re* (27 Ch. D. 554) considered
See SOLICITOR. 3. [129

—— *Ecclesiastical Commissioners for England* v. *Rowe* (4 Q. B. D. 63; 5 App. Cas. 736) explained - - - - 166
See LIMITATIONS, STATUTE OF.

—— *Farrer* v. *Lacy, Hartland & Co.* (31 Ch. D. 51) followed - - - 277
See MORTGAGE. 1.

—— *Hibbert* v. *Cooke* (1 S. & S. 552) followed
See SETTLED LAND ACTS. 1. [153

—— *Horbury Bridge Coal, Iron, and Waggon Company, In re* (11 Ch. D. 109) distinguished - - - - 603
See COMPANY. 3.

—— *Jackson, In re* (21 Ch. D. 786) distinguished
See SETTLED LAND ACTS. 1. [153

—— *Jeffery, In re* ([1891] 1 Ch. 67) considered
See INFANT. 2. [329

CASES—*continued.*

—— *London and Suburban Bank, In re* ([1892] 1 Ch. 604) approved - - 398
See BUILDING SOCIETY. 2.

—— *Makins* v. *Percy Ibotson & Sons* ([1891] 1 Ch. 133) followed - - - 574
See COMPANY. 1.

—— *Mercantile Investment Company* v. *International Company of Mexico* ([1893] 1 Ch. 484, n.) distinguished - - 477
See COMPANY. 2.

—— *Moul* v. *Groenings* ([1891] 2 Q. B. 443) explained - - - - 35
See COPYRIGHT. 2.

—— *Nottingham Patent Brick and Tile Company* v. *Butler* (15 Q. B. D. 261; 16 Q. B. D. 778) explained - - - 342
See VENDOR AND PURCHASER. 1.

—— *Olney* v. *Bates* (3 Drew. 319) followed 567
See WILL. 2.

—— *Ooregum Gold Mining Company of India* v. *Roper* ([1892] A. C. 125, 142, 143) explained - - - - 731
See COMPANY. 9.

—— *Peacock, In re* (14 Ch. D. 212) considered
See TRUSTEE ACTS. [403

—— *Rosenberg* v. *Northumberland Building Society* (22 Q. B. D. 373) considered 377
See BUILDING SOCIETY. 1.

—— *Stuart* v. *Diplock* (43 Ch. D. 343) distinguished - - - - 77
See RESTRAINT OF TRADE. 1.

—— *Trevor* v. *Whitworth* (12 App. Cas. 409, 436, 438) considered - - - 495
See COMPANY. 4.

—— *Trust and Investment Corporation of South Africa, In re* ([1892] 3 Ch. 332) explained - - - - 210
See COMPANY. 10.

—— *Wheeler* v. *Le Marchant* (17 Ch. D. 675) considered - - - - 686
See PRACTICE. 4.

—— *Wildy* v. *Mid-Hants Railway Company* (16 W. R. 409) followed - - 574
See COMPANY. 1.

—— *Wilson* v. *Miles Platting Building Society* (22 Q. B. D. 381, n.) considered - 377
See BUILDING SOCIETY. 1.

—— *Woodhouse* v. *Meredith* (1 Mer. 450) distinguished - - - - 214
See WILL. 1.

CHARGING ORDER — Solicitor — Property recovered - - - - 709
See SOLICITOR. 1.

CHARITY — *Mortmain — Will — Construction — Gift to Charity of such part of Residue "as may by Law be given for Charitable Purposes"—Will made before passing of the Mortmain and Charitable Uses Act*, 1891—*Death of Testator after passing of Act—Mortmain and Charitable Uses Act*, 1891 (54 & 55 *Vict. c.* 73), *s.* 9.] A testator, by his will, made before the passing of the Mortmain and Charitable Uses Act, 1891, bequeathed the residue of his estate to trustees, in trust to pay the income thereof to his wife for her life, and

CHARITY—*continued.*
from and after her decease in trust to pay "such part of my said residuary trust estate which may by law be given for charitable purposes," to the Brompton Hospital, and, as to the remainder of the said residuary trust estate, upon trust for Elizabeth Williams absolutely. The testator died after the passing of the Act:—*Held*, that the Act applied:—*Held*, also, that the will did not shew any intention on the part of the testator to confine the gift to the hospital to such property only as could by the law, as it stood at the date of the will, be given for charitable purposes, and that the hospital was entitled to all the residue of the testator's estate, realty as well as personalty. *In re* BRIDGER. BROMPTON HOSPITAL FOR CONSUMPTION *v.* LEWIS - - - - 44

2. —— *Sale of Land—Consent of Charity Commissioners—Charitable Trusts Act*, 1853 (16 & 17 *Vict. c.* 137), *ss.* 24, 62, 66—*Charitable Trusts Amendment Act*, 1855 (18 & 19 *Vict. c.* 124), *ss.* 29, 48.] Under the Charitable Trusts Acts, 1853 and 1855, the consent of the Charity Commissioners to the sale of land belonging to a charity is not required when the land is held on trust for the general purposes of the charity, and is not subject to any specific and particular trust distinct from those general objects. GOVERNORS OF THE CHARITY FOR THE RELIEF OF THE POOR WIDOWS AND CHILDREN OF CLERGYMEN (COMMONLY CALLED THE CORPORATION OF THE SONS OF THE CLERGY) AND SKINNER - - - 178

CHARITY COMMISSIONERS—Consent of—Sale of land - - - - 178
See CHARITY. 2.

CITY OF LONDON COURT—Building society—Winding-up - - - 398
See BUILDING SOCIETY. 2.

CLASS—Children of testator—Lapse - 567
See WILL. 2.

CODICIL—Republication of will—Land "now in my occupation" - - - 101
See WILL. 5.

COFFEE SHOP—Covenant not to keep - 77
See RESTRAINT OF TRADE. 1.

COMPANY—*Debenture-holders' Action—Appointment of Receiver and Manager—Floating Security on whole of Company's Property—Interest not in Arrear.*] A company issued debentures by which they charged their undertaking and the whole of their property, present and future, including uncalled capital, as a first charge which was to be a "floating security." In an action by the debenture-holders to enforce their security, the principal not having become due, and interest not being in arrear, but the company consenting, and there being evidence that execution had been levied by a judgment creditor upon goods of the company comprised in the debenture-holders' security, and that other actions by creditors against the company were pending:—*Held*, on the authority of *Wildy* v. *Mid-Hants Railway Company* (16 W. R. 403) that a receiver of the company's property comprised in the debentures could be appointed:—*Held*, also, on the authority of *Makins* v. *Percy Ibotson & Sons* ([1891] 1 Ch. 133), that a manager of the company's business could be appointed. EDWARDS *v.* STANDARD ROLLING-STOCK SYNDICATE - - - 574

2. —— *Debenture-holders — Compromise — Meeting—Majority binding Minority—Notice—"Fourteen clear Days"—Arrangement to receive Shares instead of Debentures—Dissentient Minority.*] A company issued a class of debentures which charged all its property, and it was provided that a meeting of debenture-holders should have power, by special resolution, "to sanction any modification or compromise of the rights of the debenture-holders against the company or against the property." The company afterwards transferred its assets to a new company subject to the debentures, and was dissolved. The new company in August, 1892, passed resolutions for voluntary winding-up with a view to reconstruction. Its funds were exhausted, and its property consisted of certain mining rights in California, which would be forfeited unless fees to a considerable amount were paid by the end of 1892. A scheme was formed for a new company with a larger capital, as part of which scheme the debenture-holders were to accept ordinary shares in the new company instead of their debentures. This scheme was duly sanctioned by the shareholders, and was also sanctioned by a special resolution of a meeting of debenture-holders on the 31st of October, 1892. A dissentient debenture-holder brought his action to restrain the carrying out of this scheme, on the ground that it was beyond the powers of a meeting of debenture-holders to sanction it so as to bind any dissentient debenture-holders. North, J., refused an interlocutory injunction, on the ground that the Plaintiff was not damnified by the proceedings if they did not bind him:—*Held*, by the Court of Appeal, the motion being treated as the trial, that the difficulty in the way of the debenture-holders enforcing their rights made the case one in which the power to compromise arose, and that this was a compromise of the rights of the debenture-holders against the property, which it was within the power of a meeting of debenture-holders to sanction by special resolution so as to bind the dissentient debenture-holders, and the action was dismissed.—But where under a similar power a resolution approving a similar scheme to exchange debentures for shares was passed by a body of debenture-holders whose rights were undisputed and capable of being enforced without difficulty:—*Held*, that the power to compromise had not arisen, and that the resolution did not bind a dissentient minority: *Mercantile Investment and General Trust Company* v. *International Company of Mexico* (post, p. 484, n.)—The question what is a "compromise" discussed.—An advertisement in the newspapers convening a meeting of debenture-holders under a trust deed is a sufficient notice, unless the deed expressly requires notice to be given by circular.—Notice "at least fourteen days before the date" of a meeting of debenture-holders means fourteen clear days between the issue of the advertisement or circular calling the meeting and the day of the meeting; and the notice so given is effectual, though it may not actually reach any debenture-

COMPANY—*continued.*
holder until some days afterwards. SNEATH *v.* VALLEY GOLD, LIMITED - - C. A. 477

3. —— *Meeting of Shareholders—Resolution—Special Resolution—Proxies—Poll not demanded—Mode of taking Votes—Voluntary Winding-up—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *ss.* 51, 129; *Sched. I., Table A, Arts.* 42, 43, 48, 51.] At a meeting of shareholders of a company, the articles of which allow voting by proxy, although no poll is demanded, the chairman, in ascertaining the number of votes given, must count the vote of each person who has appointed a proxy, not according to the number of shares held by him, but as one vote.—*In re Caloric Engine and Siren Fog Signals Company* (52 L. T. (N.S.) 846) not followed.—*In re Horbury Bridge Coal, Iron, and Waggon Company* (11 Ch. D. 109) distinguished. *In re* BIDWELL BROTHERS 603

4. —— *Reduction of Capital—Extinguishment of Shares—Confirmation by the Court—Dissentient Shareholders—Companies Acts*, 1867 (30 & 31 *Vict. c.* 131), *s.* 9; *and* 1877 (40 & 41 *Vict. c.* 26), *s.* 3.] A company, under its articles of association, was forbidden to purchase its own shares, but had power to reduce its capital and to accept surrenders of its shares, which were fully paid up. This company having two hotels, of which one was a valuable asset and the other was held under an onerous lease, entered into an arrangement with certain of its shareholders which was, in substance, that the company should sell the lease and goodwill and furniture and stores of the leasehold hotel, and that the purchasing shareholders should pay £3000 to the company for the furniture, stores, and goodwill of the hotel, and should take upon themselves the obligations of the company under the lease of the hotel, and indemnify them against loss in respect of the hotel. And it was part of the arrangement that such shareholders should surrender their shares to the company, and that the capital of the company should be reduced to the extent of such shares.—In pursuance of this arrangement the company passed a special resolution that the nominal capital of the company should be reduced by paying off the capital represented by the shares of such shareholders, and by extinguishing the liability thereon. All the creditors assented to, no shareholder dissented from the arrangement and the special resolution; and the arrangement was beneficial to the company. Upon a petition by the company for the confirmation by the Court of the special resolution:—*Held*, by the Court of Appeal, (1.) that the transaction was not a purchase by the company of its own shares, but a sale of some of its assets for less than their cash value in consideration of a release from heavy burdens, and of a surrender of shares for which the company parted with no saleable asset; (2.) that the sanction of the Court was not required except for the treatment of the shares when surrendered as permanently extinguished; and (3.) that the application being, in effect, merely one to authorize the company to reduce its nominal capital to the extent of shares which it would not want when the sale had been carried out, ought to be granted; and *held*, accordingly, that the proposed reduction of capital should be

COMPANY—*continued.*
sanctioned.—The decision of North, J., reversed. —*Trevor* v. *Whitworth* (12 App. Cas. 409, 436, 438) observed upon. *In re* DENVER HOTEL COMPANY - - - - - C. A. 495

5. —— *Stock — Registration—Legal Title — Blank Transfer—Deposit of Certificate—Purchase for Value without Notice—Constructive Notice—Fraudulent Trustee—Priority—Companies Clauses Consolidation Act*, 1845 (8 & 9 *Vict. c.* 16), *ss.* 14, 15, 18, 19, 20.] The holder of a sum of stock of a company regulated by the Companies Clauses Act, 1845, deposited with a bank as security for an advance, first, the stock certificate, which shewed that he was entitled as executor; secondly, a loan-note undertaking to execute a proper assignment of the stock when required; thirdly, a blank transfer. This transfer was not stamped, and was expressed to be in consideration of 5*s.* The stock was held by the borrower as sole executor of a sole trustee of a settlement. Before making the advance, the bank manager inquired of the borrower whether he was absolutely entitled, and was informed that he was; he also examined the will, which contained no reference to any trust; he also endeavoured to obtain a new certificate in the name of the borrower, but was correctly informed that such was not the practice of the company where the holder was entitled as executor. The bank subsequently executed the blank transfer, and became registered as the holders of the stock; but the transfer was not re-delivered or re-executed by the borrower, nor was it executed by the bank in his presence, or by his authority under seal:—*Held*, that the bank were not fixed with notice of the settlement; but *held*, that the transfer was not the deed of the borrower, and did not pass the legal title to the stock, and that the persons claiming under the settlement were entitled to priority.—*Semble*, the transfer was invalid also on the ground that it was not stamped, and did not truly state the consideration as required by the Companies Clauses Act, 1845. POWELL *v.* LONDON AND PROVINCIAL BANK - - - 610

6. —— *Transfer of Shares—Refusal to Register Transferee—Certificate issued to Transferor—Liability of Company on—Estoppel—Cause of Action—Non-performance of Duty—Measure of Damages—Jurisdiction to award Damages under Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *s.* 35.] A. bought from B. 4300 shares in a company upon the faith of a share certificate issued by the company certifying that B. was the registered owner of 4300 specified shares in the company. A. then tendered to the company a transfer from B. to himself duly executed, together with B.'s share certificate; but the company, having recently discovered that the certificate had been fraudulently obtained, refused to register the transfer:—*Held*, by the Court of Appeal (affirming the judgment of Stirling, J.):—1. That, although the certificate was not a warranty of title upon which A. could maintain an action at common law against the company, it estopped the company from disputing A.'s right to be registered.—2. That A.'s cause of action arose from the refusal of the company to perform the duty of registering a transferee who had shewn what the

COMPANY—*continued.*

company were estopped from denying to be a good title.—3. That the measure of damages was the value of the shares at the time of the refusal to register.—The directors of a company are entitled to a reasonable time for the consideration of every transfer before they register it, although not expressly empowered in that behalf by the articles of association.—*Semble*, the Court has no jurisdiction, under sect. 35 of the Companies Act, 1862, to direct a company to pay damages, except in cases where an order is made for rectification of the register.—*In re Bahia and San Francisco Railway Company* (Law Rep. 3 Q. B. 584) explained. *In re* Ottos Kopje Diamond Mines, Limited - - - - - **C.A. 618**

7. —— *Winding-up—Debenture-holders—Appointment of Receiver.*] On the 30th of September a creditor's petition to wind up a company was presented, and on the 10th of October the Official Receiver was appointed provisional liquidator. On the 11th of October the debenture-holders of the company, whose charge extended over all the property of the company, and whose interest was in arrear, commenced an action to enforce their security; and on the 14th of October a receiver was appointed on their application, with power to manage the business until the winding-up petition was disposed of. On the 25th of October a winding-up order was made, and the Official Receiver was continued as provisional liquidator. On the 28th of October leave was given to the Plaintiffs to go on with their action; and on the same day the receiver was continued, with power to manage the business. On the 24th of November, on the application of the Plaintiffs, leave was given to discontinue the business. The liquidator thereupon applied to discharge the receiver, and Vaughan Williams, J., considering that, as the business was discontinued, the reason for his appointment had ceased, discharged him. It appeared that there was no uncalled capital, and that the assets of the company were not enough to pay the debentures:—*Held*, on appeal, that the order discharging the receiver must be reversed, for that the debenture-holders, whose interest was in arrear, had a right to a receiver, which right was not taken away by the winding-up, and that the receiver ought not to be displaced without some strong reason for doing so.—A case having been fully argued by counsel before a Judge in Chambers, an appeal from the order in Chambers was heard, though the Judge had not certified that he did not require further argument. Strong *v.* Carlyle Press - **C.A. 268**

8. —— *Winding-up — Debentures charging Uncalled Capital—Debenture-holders' Action—Making Calls—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *ss.* 95, 98, 102—*Companies* (*Winding-up*) *Act*, 1890 (53 & 54 *Vict. c.* 63), *ss.* 12, 13—*Companies* (*Winding-up*) *Rules*, 1890, *r.* 92.] When a company is ordered to be wound up, the power of its directors, under its constitution, to make calls on shares ipso facto comes to an end, and the only power to make calls is that which is by statute given to the liquidator acting in the winding-up.—Therefore, where uncalled capital has been charged by the company in favour of debenture-holders, and the company is ordered to be wound up, the Court has no jurisdiction to order either a receiver appointed in an action brought to enforce the debentures, or the liquidator, to make a call in the action, but can only order the liquidator to make the call in the winding-up. The receiver in the action may, however, be empowered to take proceedings in the name of the liquidator for getting in the call. Fowler *v.* Broad's Patent Night Light Company - - - - - - - **724**

9. —— *Winding-up—Ground for Petition—"Just and Equitable"—Ultrà vires act—Issuing Shares at a Discount—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *s.* 79, *sub-s.* 5.] The fact that shares in a limited company have been issued at a discount is not a ground for making a winding-up order on the petition of a fully paid-up shareholder—even where, if the amounts unpaid on the shares were called up, there would be a surplus to be divided among the members of the company.—The remarks of Lord Herschell in *Ooregum Gold Mining Company of India* v. *Roper* ([1892] A. C. 125, 142, 143) explained. *In re* Pioneers of Mashonaland Syndicate **731**

10. —— *Winding-up—Public Examination—Report of Official Receiver—Statement or Suggestion of Fraud—Companies* (*Winding-up*) *Act*, 1890 (53 & 54 *Vict. c.* 63), *s.* 8.] The further report of the Official Receiver, under sect. 8, sub-sect. 2, of the Companies (Winding-up) Act, 1890, in support of an application for public examination, need not in terms state that, in his opinion, fraud has been committed in the promotion or formation of the company or the conduct of its business. It is sufficient if the further report state facts which suggest the existence of such fraud.—*In re Trust and Investment Corporation of South Africa* ([1892] 3 Ch. 332); and *In re Bertram Luipaard's Vlei Gold Mining Company* ([1892] 3 Ch. 332) explained. *In re* Laxon & Co. (3) - - - - **210**

11. —— *Winding-up—Restraining Proceedings against Company—Scotch Action—Arrestment jurisdictionis fundandæ causâ—Arrestment on the Dependence—Secured Creditors—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *ss.* 87, 151.] Where, prior to the commencement of the winding-up of an English company, a creditor has arrested property of the company in Scotland jurisdictionis fundandæ causâ, and has followed this up by bringing an action in Scotland, and making an arrestment on the dependence of the action, he has become, subject to his obtaining a decree in such action, a secured creditor, and will not be restrained from continuing his action.—In such a case the judgment or decree draws back to the date of the arrestment on the dependence, and the security thereby obtained applies to the debt subsequently established.—If the arrestments are impeached on the ground that they were obtained on a misstatement of facts, this is only a ground for the recall of the process by the Scotch Court, and, until so recalled, the English winding-up Court will treat the process as having been validly issued. *In re* West Cumberland Iron and Steel Company - - - - **713**

12. —— *Winding-up—Voluntary Winding-up—Supervision Order—Costs of Liquidator and*

COMPANY—*continued.*

Petitioning Creditor—Priority—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *ss.* 110, 144.] Where, on the petition of a creditor, an order is made continuing the voluntary winding-up of a company under the supervision of the Court, the costs of the liquidator incurred previously to the order are payable in priority to the petitioner's costs of obtaining the order; but those costs are payable in priority to the costs of the liquidator incurred subsequently to the order. *In re* NEW YORK EXCHANGE COMPANY - - - - 371

—— Abandonment of undertaking - - 47
See RAILWAY. 1.

—— Winding-up—Building society—Transfer to High Court - - - - 398
See BUILDING SOCIETY. 2.

—— Winding-up — Tramway company—Parliamentary deposit - - - 309
See TRAMWAY.

CONDITION—Execution of power—Validity 283
See POWER.

CONTEMPT — Order to attend as witness — Attachment—Personal service - 252
See PRACTICE. 2.

CONVERSION—£3 per cent. into £2¾ per cent. annuities—Redemption of rent-charge
See NATIONAL DEBT. [298

—— Will—Property retained at a loss—Apportionment - - - - 586
See WILL. 4.

COPYRIGHT—*Directory—Headings — Advertisements—Collection of Advertisements — Employer and Agent—Copyright Act* (5 & 6 *Vict. c.* 45), *s.* 18.] A trades directory consisted of advertisements furnished by tradesmen classified under headings denoting the different trades, which headings were composed by the Plaintiff, the registered proprietor, or by persons paid by him to compose them; but there was no express evidence that they were composed on the terms that the copyright should belong to him:—*Held*, by Chitty, J., that the publisher had no copyright in the advertisements, but had a copyright in the headings:—*Held*, by the Court of Appeal, that the Plaintiff had a copyright in the headings, and that though it was necessary under 5 & 6 Vict. c. 45, s. 18, that they should have been composed on the terms that he should have the copyright, this condition was satisfied because the fair inference from the circumstances of the case was that they had been composed on those terms. And *semble*, that although the Plaintiff could not have copyright in a single advertisement, inasmuch as the advertiser must be at liberty to insert it elsewhere, the Plaintiff had copyright in the mass of advertisements as arranged.—Canvassers who had been employed by the proprietor under agreements which bound them to devote themselves in a particular district exclusively to obtaining from traders advertisements to be inserted in the directory, and to supply the blocks and materials necessary for producing such advertisements, proposed at the expiration of their agreements to assist a rival publication in procuring similar advertisements:—*Held* (affirming the decision of

COPYRIGHT—*continued.*

Chitty, J.), that they were not entitled to use for the purposes of any other publication the materials which, while in the Plaintiff's employment, they had obtained for the purpose of his publication. LAMB *v.* EVANS - - - - C. A. 218

2. —— *International Copyright Act*, 1886 (49 & 50 *Vict. c.* 33), *s.* 6—*Application of, to existing works—Saving of Rights and Interests previously acquired—Interest from or in connection with lawful Production—Trade-mark—Interest in advertising—Subsisting and valuable Interests—Artistic Work first produced in Foreign Country.*] The Plaintiff, a German, claimed to have the photographic copyright in an oil-pointing called "Lisette," produced in Germany before December, 1885, and also the copyright in a photograph of "Lisette" as a distinct work of art.—In January, 1887, the Defendants registered as their trade-mark for candles, a photograph of "Lisette" on a small scale, with their name and the words "trade-mark" across the picture. This trade-mark was extensively used by the Defendants on their goods; it was also reproduced by them in various sizes and colours by chromolithography on show cards and trade lists for the purposes of advertisement.—In December, 1887, an Order in Council, extending the benefit of the International Copyright Act, 1886, to Germany, came into operation, and in January, 1892, the Plaintiff registered himself as the owner of the aforesaid copyrights in England, and then sought to restrain the Defendants from infringing his copyright by continuing the use of these show cards, admittedly produced subsequently to December, 1887.—*Held*, that the Defendants, as the proprietors of the trade-mark, a work lawfully produced before December, 1887, had an interest in advertising it, as they had done, by means of the show cards and trade lists: that this was an interest arising from or in connection with the trade-mark itself, which was subsisting and valuable at the date of the publication of the Order in Council, and that the Defendants were consequently protected by the proviso in sect. 6 of the International Copyright Act, 1886, and that it was not material to consider the date at which these show cards were produced; neither was it material that there was a trifling difference between the show cards and the trade-mark, so long as the substance of the trade-mark had, as here, been honestly advertised. *Moul* v. *Groenings* ([1891] 2 Q. B. 443) explained and applied. SCHAUER *v.* J. C. & J. FIELD, LIMITED - - - - - - 35

CORONER—Jurisdiction of—Treasure trove 676
See CROWN.

CORPORATION—Foreign—Service on agent in London - - - - - 362
See PRACTICE. 5.

COSTS—Appeal for—Inquiry as to lunacy 466
See LUNATIC.

—— Appeal for—Trustee's costs - - - 547
See PRACTICE. 1.

—— Liquidator—Voluntary winding-up of company—Priority - - - 371
See COMPANY. 12.

COSTS—*continued.*
—— Solicitor acting for himself as mortgagee—Profit costs - - - - 129
See SOLICITOR. 3.
—— Taxation—Solicitors' Remuneration Act
See SOLICITOR. 2. [507
COUNTER-CLAIM—Dismissal of action for want of prosecution - - - 52
See PRACTICE. 3.
COUNTY COURT RULES, 1892, r. 146 - 393
See BUILDING SOCIETY. 2.
COVENANT—For title—Estoppel - - 1
See ESTOPPEL.
—— For title—Implied covenants—"Beneficial owner" - - - - 523
See VENDOR AND PURCHASER 2.
—— Restrictive—Building estate - 195, 342
See VENDOR AND PURCHASER. 1, 3.
—— Restraint of trade - - 77, 630
See RESTRAINT OF TRADE. 1, 2.
CROWN—*Treasure Trove—Prerogative—Coroner—Inquest—Jurisdiction—Inquiry "who were the Finders and who is suspected thereof"—Inquiry as to Title—Coroners Act*, 1887 (50 & 51 *Vict.* c. 71), *s.* 36.] The jurisdiction of the coroner with reference to treasure trove is limited to an inquiry "who were the finders and who is suspected thereof." He has no jurisdiction to inquire into any question of title to the treasure as between the Crown and any other claimant, the title of the Crown to all treasure trove being independent of any finding of the coroner's jury. ATTORNEY-GENERAL *v.* MOORE - - 676

DAMAGES—Refusal to register transfer of shares
See COMPANY. 6. [618
DEBENTURE—Action by debenture-holders—Receiver and manager - - 574
See COMPANY. 1.
—— Charged on unpaid capital—Winding-up—Power to make calls - - 724
See COMPANY. 8.
—— Meeting of debenture-holders—Majority binding minority - - - 477
See COMPANY. 2.
—— Winding-up—Receiver - - 268
See COMPANY. 7.
DEFAULT OF PLEADING—Dismissal of action—Continuance of counter-claim - 52
See PRACTICE. 3.
DEFENDANT—Order to attend as witness—Attachment—Personal service - 252
See PRACTICE. 2.
DEPOSIT—Parliamentary—Railway Company
See RAILWAY. 1. [47
—— Parliamentary—Tramways Company 309
See TRAMWAY.
DIRECTORY—Copyright - - - 218
See COPYRIGHT. 1.
DISCOVERY—Production of documents - 686
See PRACTICE. 4.

ESTATE DUTY - - - - 188
See REVENUE.

ESTOPPEL—*Covenant running with the Land—Conveyance obtained by Fraud.*] S. and R., trustees of a will, sold and conveyed a piece of land to T., who mortgaged it to B. Some time afterwards T. induced them to execute to him a second conveyance of part of the same land, he representing to them that it was a conveyance of a piece of land not previously purchased by him. By this deed, which recited that the testator was seised in fee at his death, and recited his will, by which he devised his real estate to the vendors giving them a power of sale, recited his death, and that the vendors in exercise of the power had contracted for the sale to T. of this piece of land in fee simple free from incumbrances, and that S. as beneficial owner had agreed to concur, S. and R. granted, and S. confirmed, the land to T. in fee and S. and R. entered into the usual trustee covenant that they had done no act to incumber, and S. also covenanted for title. T. then mortgaged this land to the Plaintiffs. Some years afterwards B. took possession, and the Plaintiffs' security proved worthless. The Plaintiffs sued S. and R. for indemnity on the ground that S. and R. had by the second conveyance to T. misrepresented their title, and in the alternative for damages on the covenants. Kekewich, J., gave the Plaintiffs the amount of the mortgage money and interest by way of damages:—*Held*, on appeal, that the second conveyance to T. did not contain any such distinct averment that the Defendants were seised of the estate when they executed that conveyance as would estop them from denying that they were so seised; and that, as the Plaintiffs had no legal estate by estoppel or otherwise with which the covenants could run, the Plaintiffs could not sue the vendors on their covenants:—*Held*, further, that the Plaintiffs could not have any remedy on the ground of misrepresentation by the Defendants, as the representation was made honestly:—*Held*, that a plea of non est factum could not have been sustained.—Whether, even if the conveyance had been in terms sufficient to create an estoppel, the Defendants could not, although the Plaintiffs were bonâ fide purchasers for value, have successfully defended themselves on the ground that the deed containing the covenants for title had been obtained by fraud, *quære*. ONWARD BUILDING SOCIETY *v.* SMITHSON C. A. 1

EXAMINATION—Bankruptcy—Production of shorthand notes—Privilege - 686
See PRACTICE. 4.
—— Winding-up of company—Fraud in promotion - - - - 210
See COMPANY. 10.

FELONY—Loss of trust property by—Liability of trustee - - - - 71
See TRUSTEE. 3.
FIDUCIARY RELATION—Employer and agent—Canvassers for advertisements - 218
See COPYRIGHT. 1.
—— Gift inter vivos - - - 736
See UNDUE INFLUENCE.
FINES—Renewal of leaseholds—Successive tenants for life - - - - 61
See TENANT FOR LIFE. 2.

FORECLOSURE—Arrears of interest - 277
See MORTGAGE. 1.

FOREIGN CORPORATION—Service on London agent - - - - 362
See PRACTICE. 5.

FOREIGN PRINCIPAL - - - 594
See PRINCIPAL AND AGENT.

FRAUD—Covenant obtained by—Estoppel 1
See ESTOPPEL.

—— Exercise of power—Conditions attached
See POWER. [283

FRAUDS, STATUTE OF—*Parol Agreement—Guarantee—Indemnity—Debt—"Promise to answer for Debt, &c., of Another"—Promise by one Person to Himself and Another—"Note or Memorandum"—Will—Admission by Testator of Guarantee—Statute of Frauds* (29 *Car.* 2, *c.* 3), *s.* 4.] A., being a member of a partnership firm consisting of A., B., and C., verbally agreed with B. and C. to guarantee his partners against loss in respect of an existing debt due to it from his son, or, according to another version, to guarantee to the firm the balance which should be found due. A. died, having by his will given a share of his estate to his son's wife and children; and, after referring to his son's indebtedness to the firm and stating that "he had guaranteed" the firm against loss in respect of the debt, he directed that the amount of the debt should be brought into hotchpot in ascertaining the share given by his will. By a codicil he "confirmed the guarantee mentioned in his will":—*Held*, by Kekewich, J., that the verbal guarantee was a "special promise to answer for the debt, default, or miscarriages of another person," within sect. 4 of the Statute of Frauds, 29 Car. 2, c. 3, and not the less so because the promisees were the firm of which the testator, the promisor, was himself a member; that the will and codicil could not be regarded under the section as a "note or memorandum in writing" of such promise; and that the statements in the will, although they might be binding on the parties beneficially interested under the will, were not sufficient to create a debt under the guarantee:—*Held*, on appeal, that assuming the promise to be one which fell within the 4th section so as to require a memorandum in writing signed by the testator, the recital of it in the testator's will was a sufficient memorandum, and that the promise created a debt payable out of the testator's estate:—*Held*, by Bowen, L.J. (Lindley, L.J., inclining to the same view, and A. L. Smith, L.J., not giving any opinion), that the promise was, not that the testator would be answerable for the debt of the son, but that he would indemnify the other partners from loss in respect of the debt, and that a memorandum in writing was not necessary. *In re* HOYLE. HOYLE *v.* HOYLE - C. A. 84

GENERAL ORDER UNDER SOLICITORS' REMUNERATION ACT, Sched. II. - 507
See SOLICITOR. 2.

GUARANTEE—Promise to answer for debt of another - - - - 84
See FRAUDS, STATUTE OF.

GUARDIAN—Infant - - - - 143
See INFANT. 1.

IMPROVEMENTS—Settled Land Act—Application of capital - - - 153
See SETTLED LAND ACTS. 1.

INCOME—Capital or income—Apportionment—Profits of mine - - - 292
See TENANT FOR LIFE. 1.

—— Capital or income—Apportionment—Trust for conversion - - - 586
See WILL. 4.

—— Maintenance of infant—Contingent interest
See INFANT. 2. [329

INDEMNITY—Promise to answer for debt of another—Parol agreement—Statute of Frauds - - - - 84
See FRAUDS, STATUTE OF.

INFANT—*Guardian—Removal by Court—Religious Education—Welfare of Infant—Guardianship of Infants Act*, 1886 (49 & 50 *Vict. c.* 27), *ss.* 2, 3, 6, 13.] The Court has jurisdiction to remove a guardian of infants appointed by their mother after the father's death, under the power conferred on her by the Guardianship of Infants Act, 1886, if it is satisfied that it is for the benefit of the infants so to do.—The jurisdiction of the Court in relation to infants extends to infants who are not wards of Court, and who have no property; but such jurisdiction is limited to the appointment and removal of guardians, and does not extend to making schemes for their maintenance or education.—A journeyman tailor, who was a Roman Catholic, in 1876 married a woman who was a Roman Catholic. There were five surviving children of the marriage, all of whom were baptized as Roman Catholics. At the date of the hearing of the appeal they were aged as follows: a boy aged sixteen, three girls aged respectively fifteen, thirteen, eleven, and a boy aged six. The father died in 1888, and was buried as a Roman Catholic; but during his life he expressed no wish as to the religion in which his children should be brought up, and appeared indifferent on the subject. During his life his children, with his knowledge, sometimes attended Roman Catholic and sometimes Protestant schools. The eldest boy, with his father's consent, was sent to an industrial home conducted on Protestant principles. He was now in domestic service, and professed himself a Protestant. The three girls were principally educated at Roman Catholic schools. After the father's death a benevolent lady, a member of the Church of England, gave the mother, who was in very poor circumstances, regular pecuniary assistance; and in November, 1889, the mother executed a deed under the Guardianship of Infants Act, 1886, by which she appointed this lady guardian of the three girls and the youngest boy. Before her death the mother professed herself a Protestant. The two younger girls were taken some time after their father's death from the Roman Catholic school at which they then were, and all three girls were placed by the lady at a Protestant industrial home; where they still remained. The younger boy lived with his mother's brother, who was a Roman Catholic, and attended first a board school and afterwards a National school.—In November, 1891, an aunt of the father, who was a Roman Catholic, acting as next friend of

INFANT—*continued.*
the four younger children, took out a summons asking that the guardian might be removed and the next friend and a Roman Catholic lady appointed joint guardians of the children:—*Held* (affirming the decision of North, J.), that, having regard to all the circumstances, it would not be for the welfare of the children that the guardian should be removed, and that no direction ought to be given as to the religious education of the children. The summons was accordingly dismissed. *In re* McGrath (Infants) C. A. 143

2. —— *Maintenance — Contingent Interest—Income—Conveyancing and Law of Property Act*, 1881 (44 & 45 *Vict. c.* 41), *s.* 43.] Maintenance can be allowed for children out of the income of a share of residue bequeathed in trust for such of them as shall attain twenty-one, or, being daughters, marry, until such time as the interest of one of them becomes vested.—*Semble*, the whole income would belong to children who had attained a vested interest.—*In re Jeffery* ([1891] 1 Ch. 671) and *In re Burton's Will* ([1892] 2 Ch. 38) considered. *In re* Adams. Adams *v.* Adams 329

INJUNCTION—Arbitration—Unfitness of arbitrator - - - - 238
See Arbitration.

—— Breach of covenant—Covenant to employ servant - - - - 116
See Landlord and Tenant.

INQUIRY—Lunacy—Alleged lunatic—Costs 466
See Lunatic.

INTEREST—Mortgage debt—Action for, after foreclosure - - - - 277
See Mortgage. 1.

JURISDICTION—Coroner - - - 676
See Crown.

—— Injunction to restrain arbitration - 238
See Arbitration.

—— Rectification of register of shares—Power to award damages - - - 618
See Company. 6.

LANDLORD AND TENANT—*Specific Performance—Injunction—Covenant to Employ Servant to perform Services—Contract, Performance of which Court cannot Superintend—Specific Performance of part of Contract.*] The lease of a residential flat, in a block of buildings let in flats to several tenants, contained a covenant by which it was agreed and declared by and between the parties to the lease that the premises were let subject to the regulations made by the lessors with respect to (among other things) the duties of the resident porter, which were set forth in a schedule thereto. These regulations, in effect, provided that the block of buildings should be in charge of a resident porter, appointed by the lessors, who was to act as the servant of the tenants in the block, to be constantly in attendance either by himself or, in his temporary absence, by some trustworthy assistant, and to perform certain services specified by the regulations.—The lessors appointed to the situation of resident porter a man who was by avocation a cook. He for the most part employed boys and charwomen to perform his duties as porter, and absented himself from the premises every weekday for several hours for the purpose of acting as chef at a neighbouring club:—*Held* (reversing the decision of A. L. Smith, J.), in an action by the lessee against the lessors for breach of the covenant, that the Court could not grant an injunction to prevent continuance of the breach of the covenant or order specific performance of it. Ryan *v.* Mutual Tontine Westminster Chambers Association - - - - C. A. 116

LAPSE—Children of testator—Class - 567
See Will. 2.

LIMITATIONS, STATUTE OF—*Lease for Lives—Sub-Lease—Surrender of Original Lease—New Lease for Lives—Recovery of Possession—Statute* 4 *Geo.* 2, *c.* 28, *s.* 6.] In 1805, R., then Chancellor of the Cathedral Church of St. Paul, London, and parson of the parish church of Ealing, granted a lease for three lives of the glebe lands and hereditaments, of which he was seised in fee.—In 1807, the tenants under the lease of 1805 granted a sub-lease of part of the property for ninety-nine years, determinable on the dropping of the same lives as in the principal lease. The last of such lives dropped in 1874.—On the 24th of August, 1832, the persons then entitled to the lease of 1805 surrendered such lease to R., and on the following day R. granted a fresh lease for three lives. The last of such lives dropped in 1891.—The Plaintiffs, who claimed through R., had ever since the death of R., in 1839, received the rent reserved by the lease of 1832.—The Defendants, claiming through the sub-lessee, had been since 1874 in actual possession of the lands without title.—The Plaintiffs claimed recovery of possession and mesne profits, on the ground that their title first accrued in 1891.—The Defendants claimed to be entitled in fee, on the ground that the Plaintiffs' title first accrued in 1874, and they claimed the benefit of the Statute of Limitations.—*Held*, that, by the lease of August, 1832, an immediate estate passed to the lessees therein named, and not a mere right in the nature of an interesse termini to a future estate, to come into existence on the determination of the sub-lease; and, moreover, that such lease was by virtue of the statute 4 Geo. 2, c. 28, s. 6, a valid lease, and was a lease which, passing an estate to the new lessees, prevented the grantor, and those claiming under him, from seeking to recover the lands till that lease had expired; and, therefore, that the Plaintiffs' title did not accrue till 1891 when the last life dropped.—*Ecclesiastical Commissioners for England* v. *Rowe* (5 App. Cas. 736) discussed and explained. Ecclesiastical Commissioners for England *v.* Treemer - - - 166

—— Breach of trust - - - 304, 590
See Trustee. 1, 2.

LEASE—Covenant—Restraint of trade - 77
See Restraint of Trade. 1.

—— Covenant to employ servant - - 116
See Landlord and Tenant.

—— For lives—Surrender — Sub-lease—Statute of Limitations - - - 166
See Limitations, Statute of.

LEASE—*continued.*
—— Succession duty on determination of—Sale free from incumbrances - - 695
See VENDOR AND PURCHASER. 4.
LEASEHOLDS—Renewable—Bequest of—Successive tenants for life - - 61
See TENANT FOR LIFE. 2.
LIABILITY—Trustee - - - 71
See TRUSTEE. 3.
LIEN—Solicitor—Property recovered - 709
See SOLICITOR. 1.

LUNATIC—*Alleged Lunatic—Inquiry into Mental Condition—Alleged Lunatic found of Sound Mind—Costs of Inquiry—Appeal—Lunacy Act*, 1890 (53 & 54 *Vict. c.* 5), *ss.* 90, 94, 98, 109—*Rules of Supreme Court*, 1883, *Order* XLVI., *r.* 1.] An inquiry instituted on the petition of a husband as to the state of his wife's mind resulted in a finding that she was of sound mind and capable of managing herself and her affairs. The Lords Justices sitting as Judges in Lunacy made, on the application of the Petitioner, an order that two-thirds of his costs of the inquiry and also his costs of the application should be paid by the wife. Subsequently an order was made by a Judge charging the costs on certain consols belonging to the wife and standing in her name, and directing the transfer by her of a sufficient amount to meet such costs; and, as she neglected to make the transfer, a further order was made by the Judge that the official solicitor should execute the necessary transfer. On appeal against these orders:—*Held*, that an appeal would lie in such a case to the Court of Appeal, and that no leave to appeal was necessary:—*Held*, also, that the Lords Justices had authority under sect. 109 of the Lunacy Act, 1890, to direct that the costs should be paid out of the wife's estate, including those incurred after the finding that she was of sound mind:—*Held*, also, that the procedure under Order XLVI., r. 1, which deals with charging orders, was not applicable to such an order, and that the subsequent orders to enforce the charge were proper to carry it into effect:—*Held*, also, that, under the circumstances of the case, the discretion of the Lords Justices had been rightly exercised. *In re* CATHCART - C. A. 466

MAINTENANCE—Infant—Contingent Interest
See INFANT. 2. [329
MAJORITY—Powers of—Meeting of debenture holders - - - - 477
See COMPANY. 2.
MANSION-HOUSE—Repairs of - - 153
See SETTLED LAND ACTS. 1.
MINE—Open workings—Land taken by railway company - - - - 427
See RAILWAY. 2.
—— Under canal—Right of support - 16
See CANAL.

MORTGAGE — *Foreclosure Action — Subsequent Action for Arrears of Interest—Liquidated Sum—Rules of Supreme Court*, 1883, *Order III., r. 6; Order XIV.*] Mortgagees commenced in May, 1891, an action claiming payment of the principal and interest, an account of what was due, foreclosure, and a receiver. In June the equitable tenant for life of the mortgage money was appointed in the action to be receiver of the rents of the mortgaged property, with directions authorizing him to retain the arrears of interest and the current interest out of the rents. The rents were insufficient to pay the current interest. The action had not yet been tried. In September, 1892, the Plaintiffs commenced a second action against the mortgagor, indorsing the writ for a definite sum, being the amount of two years' interest from August, 1890, less the amount of rents received, and they applied for immediate judgment under Order XIV. Kekewich, J., ordered payment:—*Held*, on appeal, that as, according to the form of order settled in *Farrer* v. *Lacy, Hartland & Co.* (31 Ch. D. 51), a mortgagee in a foreclosure action obtains a personal order for payment of the principal with interest down to the date of the certificate, the money to be recovered in the second action could be recovered in the first, and that the second action, therefore, was improperly brought:—*Held*, also, that the case did not come within Order XIV.; for that as the receiver was receiving the rents with liberty to retain the interest out of them, there was no liquidated sum for which the writ could be indorsed under Order III., r. 6.—The order for payment was, therefore, discharged. EARL POULETT *v.* VISCOUNT HILL [C. A. 277

2. —— *Priority—Co-Executors and Legatees in Trust of Mortgagee—Negligence by one of them—Subsequent Incumbrances by Mortgagor—Title to Deeds.*] Under the will of a mortgagee of two leasehold properties, who died in 1880, A. and B. were executors and joint devisees and legatees of trust and mortgage estates, and A. was entitled to a life interest in all the testator's own property, with remainder to B. In 1884 the mortgagor told A., who had possession of the title-deeds of the mortgaged property, and was pressing for repayment of the mortgage debt, that he could not borrow the money to pay it off unless the title-deeds were sent to him; and A., without B.'s knowledge, sent the mortgagor a parcel containing the title-deeds, which consisted of two assignments and one mortgage, in order to enable him to raise money to pay off the mortgage debt or part of it. The mortgagor did not pay off any part of the mortgage debt, but after some time he returned to A. a parcel which was supposed to contain the deeds.—After A.'s death in 1890 it was found that the parcel returned contained the mortgage-deed only, and that the mortgagor had purported to execute a legal mortgage in favour of a bank, to secure money lent to him by them without notice of the existing mortgage, and had handed over the two assignments to them.—In an action for the administration of the mortgagor's estate it was *Held*, that whatever rights the bank might have had against A., the acts of A. did not preclude B. from setting up his legal title as surviving executor and devisee and legatee of the mortgage estate of the testator, and that B. was entitled to priority over the bank in respect of the mortgage of 1879; and *Held*, also, that the bank must deliver up to B., as the surviving executor and

MORTGAGE—*continued.*
legal owner of the mortgaged property, the title-deeds in their possession. *In re* INGHAM. JONES *v.* INGHAM - - - - - 352
—— Building society — Advanced member — Alteration of rules - - 377
See BUILDING SOCIETY. 1.
—— Costs of mortgagee—Solicitor acting for himself - - - - 129
See SOLICITOR. 3.
—— Devise of land held on mortgage—Whether mortgage debt passes - - 214
See WILL. 1.

MORTMAIN—Will made before Mortmain Act, 1891 - - - - - 44
See CHARITY. 1.

NATIONAL DEBT—*Conversion—Perpetual Rent-charge—Option to Redeem by Transfer of Specified Amount of "£3 per Cent. Annuities"—Right to substitute New 2¾ per Cent. Annuities—National Debt (Conversion) Act*, 1888 (51 & 52 *Vict. c.* 2), *s.* 21, *sub-s.* 1; *s.* 25, *sub-s.* 2.] The Plaintiffs, by a deed executed in 1871, created a perpetual rent-charge of £10,000 a year, for the benefit of the first Defendant. The deed provided that the Plaintiffs should be entitled at any time to redeem the rent-charge by transferring to the trustees thereof a specified amount of "£3 per Cent. Annuities." In 1888 the National Debt (Conversion) Act was passed:—*Held*, that, by virtue of sect. 25, sub-sect. 2, of that Act, the Plaintiffs were entitled to redeem the rent-charge by transferring to the trustees the specified amount of 2¾ per Cent. Stock created under the Act. DUKE OF NORTHUMBERLAND *v.* PERCY - - 298

NEGLIGENCE—Mortgage—Priority - 352
See MORTGAGE. 2.

NEW TRUSTEES—Vesting order - - 403
See TRUSTEE ACTS.

NOISE—Musical instruments—Teacher of music
See NUISANCE. [316

NOTICE — Constructive — Deposit of shares—Blank transfer - - - 610
See COMPANY. 5.
—— Meeting of debenture-holders — Fourteen clear days - - - - 477
See COMPANY. 2.

NUISANCE—*Noise—Playing on Musical Instruments—Reasonable Use of House — Malice—Injunction.*] The giving of musical lessons by a teacher of music, the lessons extending over seventeen hours in a week, in a house separated from the adjoining house by a party-wall, there being also from time to time practising on the piano and violin, and singing, and in the evening musical performances for the entertainment of the persons living in the house, and occasionally musical parties, and frequent practising on the violoncello as late as eleven at night:—*Held*, not to constitute a legal nuisance of which the occupier of the adjoining house was entitled to complain.—But an injunction was granted to restrain the occupier of the adjoining house from causing or permitting any sounds or noises in his house, so as to vex or annoy the occupier of the first house, the Court being satisfied that he had been making noises on musical instruments and otherwise maliciously for the purpose of annoying the occupier of the first house. CHRISTIE *v.* DAVEY - - - - - 316

PARTNERSHIP—*Articles—Provision for Cesser of Partnership on Bankruptcy, and Retention of Bankrupt Partner's Share—Invalidity—Receiver and Manager—Terms of Appointment.*] Articles of partnership provided that the partnership should continue for fourteen years from the 1st of January, 1891; that if any partner should die or become bankrupt, he should be deemed to have ceased to be a partner on the date of such death or bankruptcy, and his share in the capital should remain as a loan to the surviving or continuing partners or partner during the residue of the term of fourteen years, or during such shorter period as they should carry on the business, either alone or in partnership with others, bearing interest at 5 per cent., and the payment of the said loan with interest should be secured by the joint and several bond, or the bond or covenant of the surviving or continuing partners or partner. —The partnership firm consisted of a father and his three sons, of whom the Defendant was the youngest. The whole of the capital was provided by the father.—In June, 1892, the father and the two elder sons became bankrupt, and the trustees in their bankruptcy brought an action against the defendant for a declaration that the provisions of the articles under which the Defendant claimed to retain as a loan the respective shares of the bankrupts in the capital of the partnership were void as against the creditors of the bankrupts, and moved for the appointment of a receiver and manager of the partnership business. The Defendant claimed the right, as solvent partner, to be appointed receiver and manager:—*Held*, that the Defendant was entitled to be appointed receiver and manager; but that he must give security, pass his accounts, furnish the Plaintiffs with proper accounts, allow them all reasonable access to the books, and pay the balance in his hands, as and when they reached a certain amount to be agreed upon, into Court, or into a joint banking account of the Plaintiffs and himself. COLLINS *v.* BARKER - - - 578

2. —— *Value of Share of Deceased Partner—Direction to ascertain by Reference to Last Signed Annual Account — Death after Expiration of Partnership Year before Taking or Signing Account.*] Where, under a partnership deed, the value of a deceased partner's share is to be ascertained by reference to the last annual account signed previously to his death, and such annual accounts are directed to be taken and signed by the partners at the end of each partnership year, or as near thereto as conveniently may be, if a partner dies shortly after the expiration of a partnership year, and before the account for that year has been actually signed or taken, the surviving partners cannot insist on the value of the share of the deceased partner being ascertained by reference to the last signed annual account; but the legal personal representative of the deceased partner is entitled to have the

PARTNERSHIP—*continued.*
account taken for the partnership year which expired immediately before his death, and to have the value of his share ascertained by reference to such last-mentioned account—and this notwithstanding it has been the practice of the firm not to take and sign the annual account till a period of the year later than that at which the death occurred.—And, *semble*, that it is immaterial whether the account for the partnership year immediately preceding the death could or could not have been actually taken and signed between the end of such year and the date of the death. HUNTER *v.* DOWLING - - - - 391

—— Solicitors—Member of firm acting for his partner—Profit costs - - 129
See SOLICITOR. 3.

PATENT—*Patentee—Action to Restrain Threats of Legal Proceedings — Threats by Letters in answer to inquiries—Privilege—Patents, Designs, and Trade Marks Act*, 1883 (46 & 47 *Vict. c.* 57), *s.* 32.] Threats of legal proceedings for infringement of patent rights are actionable whether addressed to the infringer himself or intimated to a third person, and are none the less "threats" within the meaning of the section because they are made in answer to inquiries.—In construing the expression in sect. 32, threats "by circulars, advertisements, or otherwise" the words "or otherwise" are to be read, not as being restricted to threats by measures ejusdem generis with "circulars or advertisements," but as extending the previous words so as absolutely to prohibit any threats whatever of legal proceedings unless the case comes within either of the two provisoes at the end of the section.—In an action to restrain threats of legal proceedings under sect. 35, no defence can be based upon the ground that what the Defendant did was done bonâ fide, or that it was done on a privileged occasion.—The decision of North, J., affirmed. SKINNER & Co. *v.* SHEW & Co. - - - - C. A. 413

PERPETUITY—Invalid power of appointment
See WILL. 3. [54

PETITION—Winding-up—Ground for petition
See COMPANY. 9. [731

PHOTOGRAPH — Foreign — International copyright - - - - - 35
See COPYRIGHT. 2.

POWER—*Exercise—Validity—Condition attached—Fraud on Power.*] Under the will of her father a testatrix had power to appoint a fund among her children or remoter issue. In default of appointment the fund was to go to her children in equal shares at twenty-one or marriage. She had two sons and two daughters. By her will, which recited the power, and stated that she had appointed the greater part of the fund in favour of her daughters, and that the only part remaining unappointed was a sum of £713 Consols, she, in exercise of the power, appointed the £713, and all other the trust moneys over which she had a power of appointment under her father's will, to her sons in equal shares, on condition that they should give up all claim to the proceeds of the sale of the furniture in a house formerly occupied by her, and sign a release to her executors in respect of all claims to any portion of the produce of the sale of the furniture within three months after her death. But, in the event of their making any claim to the furniture, or the produce of the sale thereof, or refusing, neglecting, or declining to give such release to her executors within the time specified, then she appointed the £713, and the trust funds thereinbefore appointed, to one of her daughters absolutely. She bequeathed the residue of her estate to a person who was not an object of the power. Besides the £713, there was, in fact, a further sum of £934, which the testatrix had not previously appointed. The furniture to which she referred had been bequeathed by her deceased husband to herself for life, with remainder to her sons in equal shares. Power was given to her to sell it; but, if she did so, the proceeds of sale were to be held on the same trusts. She had sold the furniture for about £700, and had received the proceeds of sale, so that her sons had a claim against her estate for those proceeds.—There was no evidence that the appointment was made in pursuance of any bargain between the testatrix and her sons, or that the sons knew of the appointment before her death:—*Held*, that the appointment could not be severed from the condition; that it was made for the purpose of increasing the estate of the testatrix for the benefit of the residuary legatee by the amount of the claim which her sons had against her; that it would not have been made but for this; and that, consequently, the appointment was void in toto as a fraud on the power. *In re* PERKINS. PERKINS *v.* BAGOT [283

POWER OF ATTORNEY—Execution of bill of sale - - - - - 335
See BILL OF SALE.

—— Sale of stock—London stockbroker—Country customer - - - - 594
See PRINCIPAL AND AGENT.

PRACTICE—*Appeal for Costs—Trustee—Rules of Supreme Court*, 1883, *Order* LXV., *r.* 1—*Judicature Act*, 1873 (36 & 37 *Vict. c.* 66), *s.* 49.] Costs incurred by a trustee in an action respecting the trust estate are not costs in the discretion of a Judge who did not try the action, within Order LXV., rule 1, but are charges and expenses incurred in the execution of the trusts; and if such a Judge acting in the administration of the estate makes an order as to such costs, his decision is subject to appeal.—Real estates were devised to trustees in trust for S. during her life, in such terms as gave her the legal estate, and after her death in trust to sell. S. desired to sell the estates under the Settled Land Act, and applied to the surviving trustee for the title-deeds. The trustee, acting under the advice of his solicitor, refused to give them up, and S. brought an action of detinue in the Queen's Bench Division, and recovered judgment against him with costs. The trustee took out an originating summons in the Chancery Division, and obtained an order for payment of the costs incurred in the action out of the trust estate:—*Held*, that the costs of the action of detinue were not costs in the discretion of the Judge of the Chancery Division within Order LXV., rule 1, and that his decision was subject to appeal:—*Held*, also, reversing the decision

PRACTICE—*continued.*

of Kekewich, J., that the trustee, not having shewn reasonable cause for defending the action, was not entitled to retain out of the trust estate the costs of the action beyond the amount which he would have incurred by applying for leave to defend it.—*Charles* v. *Jones* (33 Ch. D. 80) explained. *In re* BEDDOE. DOWNES *v.* COTTAM [C. A. 547

2. —— *Attachment—Non-appearance of Defendant—Examiner—Order on Defendant to attend as Witness—Party to Action—Contempt—Filing Notice of Motion—Personal Service—Irregularity—Imprisonment—Discharge, Application for—Rules of Supreme Court*, 1883, *Order* XLIV., *r.* 2; *Order* LXVII., *r.* 4; *Order* LXX., *r.* 1; *Order* LXXII., *r.* 2.] A Defendant to an administration action, who did not appear to the action, was ordered to attend before the examiner as a witness on the part of the Plaintiff on certain inquiries directed in the action. The Defendant having disobeyed that order and also a further order to attend at his own expense, the Plaintiff moved for and obtained an order for leave to issue a writ of attachment, under which the Defendant was imprisoned. The notice of motion on which the order was made was not served on the Defendant personally, but was filed under Rules of Supreme Court, 1883, Order LXVII., rule 4:—*Held*, that attachment and not committal was the proper course, and that the filing of the notice of motion for attachment was sufficient without personal service.—*Semble*, that the proceeding was not so far of a criminal nature as to make the order not appealable. *In re* EVANS. EVANS *v.* NOTON [C. A. 252

3. —— *Counter-claim—Dismissal of Action for want of Prosecution—Continuance of Counter-claim—Motion for Judgment on Counter-claim in Default of Reply—Rules of Supreme Court*, 1883, *Order* XXI., *r.* 16; *Order* XXIII., *r.* 4; *Order* XXVII., *r.* 11.] After the Defendant to an action had delivered a counter-claim, the action was dismissed for want of prosecution, the Plaintiff not having delivered a reply within the time limited for that purpose:—*Held*, that the Defendant was entitled, under Order XXVII., rule 11, to set down the action on motion for judgment according to his counter-claim. ROBERTS *v.* BOOTH - 52

4. —— *Production of Documents—Examination under Bankruptcy Act*, 1883 (46 & 47 *Vict.* c. 52), *s.* 27—*Transcript of Shorthand-writer's Notes of Examination—Privilege.*] When an examination of witnesses has taken place under sect. 27 of the Bankruptcy Act, 1883, upon the application of a trustee in bankruptcy, and with the view of enabling his solicitor to advise him whether an action should be brought with reference to the bankrupt's affairs, the transcript of the shorthand-writer's note of the proceedings at such examination is a document entitled to privilege.—*Wheeler* v. *Le Marchant* (17 Ch. D. 675) discussed. LEAROYD *v.* HALIFAX JOINT STOCK BANKING COMPANY - - - 686

5. —— *Writ—Service on Foreign Corporation—English Shareholders—Register of Transfers kept in London—Service on Agent in London—Setting aside—Rules of the Supreme Court*, 1883, *Order* IX., *r.* 8.] The Defendant company was incorporated according to the law of one of the United States, for the purpose of carrying on the business of hotel proprietors in America. The offices of the company were in America, and its business was managed by a board of directors resident there. Three-fourths of the capital of the company was held by English shareholders, for whose convenience the company employed an agent in London, who had offices there, and whose duties were to keep a record of dealings with the shares held by the English shareholders, to countersign certificates of shares, to receive payment of calls, and to remit the proceeds to America. The agent had business connections with other companies, whose names, together with that of the Defendant company, were written up on the door of his offices. Circulars and prospectuses relating to the company were issued by him, in which his offices were described as the London offices of the company. There was in his offices certain furniture belonging to the company, and money belonging to the company had been on one occasion lent by him for a period upon the London Stock Exchange.—In an action brought by a shareholder to restrain the company from carrying into effect certain resolutions for its reconstruction, the writ was served upon the London agent at his offices:—*Held*, that the service must be set aside. BADCOCK *v.* CUMBERLAND GAP PARK COMPANY - - 362

—— Appeal for costs—Inquiry as to lunacy 466
See LUNATIC.

—— Trustee Acts - - - - 403
See TRUSTEE ACTS.

PRINCIPAL AND AGENT—*Power of Attorney—Sale and Transfer of Stock—Liability of London Stockbroker to Country Customer—Payment in Account to Country Stockbroker—Foreign Principal.*] C., living in Canada, sent through X., a country stockbroker in England, a power of attorney for sale of "£1000 Goschens standing in the name of C." to the Defendants, who were the London agents of X., with instructions to sell. The Defendants sold the stock for £970, with which (less commission) they credited X. in his general account with them. The account between X. and the Defendants was ultimately balanced by subsequent entries, including two bills drawn by X. and accepted and paid by the Defendants, but no payment expressly on account of the sale of Consols.—The fact of the sale of the stock was not discovered by C. for several months, when X. was insolvent; and no part of the proceeds of sale was received by C.:—*Held*, that the Defendants were not relieved either by the transactions between them and X., or by the fact that C. was a foreign principal, from liability; and judgment given for the proceeds of the stock with interest at 4 per cent.—*Bridges* v. *Garrett* (Law Rep. 5 C. P. 451) distinguished. CROSSLEY *v.* MAGNIAC [594

PRIORITY—Mortgages—Negligence—Right to title-deeds - - - - 352
See MORTGAGE. 2.

PRIVILEGE—Production of documents - 686
See PRACTICE. 4.

PRIVILEGE—*continued.*
—— Threats to take legal proceedings - 413
See PATENT.

PROBATE DUTY - - - - 188
See REVENUE.

PRODUCTION OF DOCUMENTS—Privilege 686
See PRACTICE. 4.

PROXY—Meeting of shareholders—Mode of voting - - - - 603
See COMPANY. 3.

PUBLIC POLICY—Restraint of trade - 630
See RESTRAINT OF TRADE. 2.

RAILWAY—*Abandonment of Undertaking—Parliamentary Deposit—Repayment to Depositor—Jurisdiction of Court—Parliamentary Deposits and Bonds Act*, 1892 (55 & 56 *Vict. c.* 27), *s.* 1.] Under sect. 1 of the Parliamentary Deposits and Bonds Act, 1892, the Court has no jurisdiction to make an order for the repayment of a Parliamentary deposit until the time limited for the completion of the company's undertaking has expired, even though the company's compulsory powers for the purchase of land have expired, and they have raised no capital and have taken no steps to acquire land, and have passed a resolution to abandon the undertaking. *Ex parte* CHAMBERS - - - - - - 47

2. —— *Minerals—Open Workings—Railways Clauses Consolidation Act*, 1845 (8 & 9 *Vict. c.* 20), *ss.* 77, 78, 79.] A railway, which was subject to the provisions of the Railways Clauses Consolidation Act, 1845, passed over a bed of valuable clay, the manner of working which in the district was by open quarrying. The owner, who had sold the land to the company reserving mines, gave notice to the railway company of his intention to work the clay, and the company did not purchase it:—*Held* (affirming the decision of Kekewich, J.), that the owner was entitled to work the clay from the surface, and for that purpose to enter upon the land conveyed by him to the company, and to remove the ballast and surface soil lying above such clay. RUABON BRICK AND TERRA COTTA COMPANY *v.* GREAT WESTERN RAILWAY COMPANY - - C. A. 427

RECEIVER—Debenture-holders - 268, 574
See COMPANY. 1, 7.

—— Partnership - - - - 578
See PARTNERSHIP. 1.

REGISTRATION—Transfer of shares—Refusal to register—Damages - - 618
See COMPANY. 6.

RELIGIOUS EDUCATION—Infant—Wishes of father - - - - 143
See INFANT. 1.

REMOTENESS—Invalid power of appointment—Limitations in default of appointment
See WILL. 3. [54

RENT-CHARGE—Redemption—Specified amount of £3 per cent. annuities—Conversion into £2¾ per cent. annuities - 298
See NATIONAL DEBT.

RESTRAINT OF TRADE—*Covenant not to keep a Coffee House—Sale of Refreshments by Grocer—Ancillary Business.*] The Defendants were bound by a covenant in the lease of their house, not to use the same as a coffee house. The Defendants were dealers in tea, coffee, and other groceries; but they proposed, as ancillary to their business, and for the convenience of their customers, to sell light refreshments consisting of cups of tea and coffee, bread and butter, pastry, ham sandwiches, and pork pies, to be consumed on the premises:—*Held* (affirming the decision of North, J.), that the sale of light refreshments was carrying on the business of a coffee-house keeper, and was a violation of the covenant; and an injunction was granted accordingly.—*Buckle* v. *Fredericks* (44 Ch. D. 244) followed.—*Stuart* v. *Diplock* (43 Ch. D. 343) distinguished. FITZ *v.* ILES C. A. 77

2. —— *Covenant—Sale of Business—General Restraint—Partial Restraint—Trade Secret—Time—Space—Articles of English Use—Monopoly—Public Policy—Injunction.*] The Defendant, who was interested in several businesses, including the business of a manufacturer of guns and ammunition, in 1886 sold the latter business for a large sum to a limited company, whose business was, in 1888, taken over by the Plaintiffs, another limited company incorporated partly for that purpose; and the Plaintiff company and the Defendant entered into an agreement whereby the Defendant was to act as their managing director at a fixed salary, the Defendant (who was then forty-six years of age) covenanting that he would not "during the term of twenty-five years from the date of the incorporation of the company, if the company should so long carry on business, engage, except on behalf of the company, either directly or indirectly, in the trade or business of a manufacturer of guns or ammunition, or in any business competing or liable to compete in any way with that for the time being carried on by the company"; but other businesses in which the Defendant was interested were excepted from the restriction. Under that agreement the Defendant acted as the Plaintiff company's managing director until 1890, when he ceased to be such director, and he afterwards joined a rival gun and ammunition company. The Plaintiff company then brought an action against the Defendant to enforce his covenant by injunction:—*Held* (reversing Romer, J.), that the covenant, as restricted to the gun and ammunition business, though unlimited as to space, and practically covering the remainder of the Defendant's life, was under the circumstances reasonable, and ought to be enforced by injunction.—Covenants in general and partial restraint of trade discussed. MAXIM NORDENFELT GUNS AND AMMUNITION COMPANY *v.* NORDENFELT [C. A. 630

REVENUE—*Administration—Probate Duty—Estate Duty—Incidence—Specific and Residuary Legatees—Customs and Inland Revenue Act*, 1881 (44 & 45 *Vict. c.* 12), *ss.* 27, 41—*Customs and Inland Revenue Act*, 1889 (52 & 53 *Vict. c.* 7), *s.* 5.] The incidence of the new duties imposed by the Customs and Inland Revenue Act, 1881, s. 27, and the Customs and Inland Revenue Act, 1889, s. 5, is governed by the same principle as that which regulated the incidence of the old probate

REVENUE—*continued.*
duty, namely, that it should be borne by the general residuary personal estate.—The testatrix, who died in 1891, by her will, dated in 1870, after making certain pecuniary bequests and specific gifts of property, partly real and partly personal, and disposing of the residue of her real estate, gave the residue of her personal estate to M. absolutely:—*Held* that the stamp duty payable under sect. 27 of the Customs and Inland Revenue Act, 1881, and the estate duty payable under sect. 5 of the Customs and Inland Revenue Act, 1889, must be paid by M. alone, and not rateably by him and the specific legatees.—*In re Croft* ([1892] 1 Ch. 652) distinguished. *In re* BOURNE. MARTIN *v.* MARTIN - - - - - 188

RULES IN WINDING UP, 1890, r. 92 - 724
See COMPANY. 8.

RULES OF SUPREME COURT, Order III., r. 6
See MORTGAGE. 1. [277

—— **Order IX., r. 8** - - - - 362
See PRACTICE. 5.

—— **Order XIV.** - - - - 277
See MORTGAGE. 1.

—— **Order XXI., r. 16** - - - 52
See PRACTICE. 3.

—— **Order XXIII., r. 4** - - - 52
See PRACTICE. 3.

—— **Order XXVII., r. 11** - - - 52
See PRACTICE. 3.

—— **Order XLIV., r. 2** - - - 252
See PRACTICE. 2.

—— **Order XLVI., r. 1** - - - 466
See LUNATIC.

—— **Order LXV., r. 1** - - - 547
See PRACTICE. 1.

—— **Order LXVII., r. 4** - - - 252
See PRACTICE. 2.

—— **Order LXX., r. 1** - - - 252
See PRACTICE. 2.

—— **Order LXXII., r. 2** - - - 252
See PRACTICE. 2.

SALE OF BUSINESS—Covenant in restraint of trade - - - - - 630
See RESTRAINT OF TRADE. 2.

SCOTCH ACTION — Arrestment jurisdictionis fundandæ causâ - - - 713
See COMPANY. 9.

SECURED CREDITOR—Winding-up of company —Scotch arrestment - - 713
See COMPANY. 9.

SERVICE — Foreign corporation — Agent in London - - - - - 362
See PRACTICE. 5.

—— Personal attachment—Filing notice of motion - - - - - 252
See PRACTICE. 2.

SETTLED LAND ACTS—*Application of "Capital Money"—Improvements—Mansion-house—Alterations with a view to Letting—"Rebuilding"—"Rental" of Settled Land—Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), *s.* 22, *sub-s.* 5; *s.* 25—*Settled Land Act*, 1890 (53 & 54 *Vict. c.* 69), *s.* 13 *sub-ss. ii., iv.*; *s.* 15—*Repairs—Dry-rot—Salvage*

SETTLED LAND ACTS—*continued.*
—Tenant for Life—Infant Remainderman—Expenditure of Trust Money—Jurisdiction.] There must be a present intention to let, if not an immediate prospect of letting, before the expenditure of any capital money will be authorized in "additions to or alterations in buildings," under sect. 13. sub-sect. ii., of the Settled Land Act, 1890. The "rebuilding" mentioned in sect. 13, sub-sect. iv., will not include structural repairs, however extensive, and in calculating the "annual rental" of the settled land, for the purposes of the proviso at the end of sect. 13, sub-sect. iv., income derived from capital money invested should be included.—A testator devised his real estate to the use of three persons successively for life, without impeachment of waste, with remainders over. The last tenant for life was an infant. He also bequeathed his residuary personal estate to trustees, upon trusts corresponding with the limitations of his real estate. At the testator's death the mansion-house was very dilapidated; structural alterations and repairs were alleged to be absolutely necessary to make the house habitable for the present tenant for life, who proposed to occupy it. The trustees, with the consent of all the tenants for life, applied for leave to expend part of the residuary personal estate in carrying out repairs, necessary for the preservation of the house, on the ground that it would be for the benefit of all persons interested in the estate:—*Held*, that there was no jurisdiction to charge the interest of the infant tenant for life in remainder with the expenditure proposed.—*In re Jackson* (21 Ch. D. 786) and *Conway* v. *Fenton* (40 Ch. D. 512) distinguished:—*Held*, also, that whether the Settled Land Acts did or did not exclude or fetter the general jurisdiction of the Court—as to which no opinion was expressed—they were of great assistance in guiding the Court to a proper conclusion as to what repairs and improvements should be allowed. Admittedly the proposed expenditure was not, in this case, within the Settled Land Acts; consequently, on this ground also, the application ought to be refused.—*Hibbert* v. *Cooke* (1 S. & S. 552) discussed and followed. *In re* DE TEISSIER'S SETTLED ESTATES. *In re* DE TEISSIER'S TRUSTS. DE TEISSIER *v.* DE TEISSIER [153

2. —— *Tenant for Life—Person having Powers of Tenant for Life—Trust for Accumulation of Income for Payment of Debts—Determination or Suspension of Life Estate—Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), *s.* 2 *sub-ss.* 2, 5, 7; *s.* 58, *sub-s.* I., *cl. vi.*] A testator devised his real estate to trustees upon trust to permit his daughter to receive the rents and profits during her life for her separate use, and directed that if a certain claim against him for £1000, settled by him on her marriage, should be enforced, then "all her interest and benefit from the estate" should "cease until all the debts and claims on the same" were paid; with a gift over at her death in favour of her children. After the testator's death the claim for £1000 was enforced. The personal estate of the testator was insufficient for payment of the £1000 and other debts and claims. The daughter, who was the heiress-at-law of the testator, claimed a declaration that she had

SETTLED LAND ACTS—*continued.*
the powers of a tenant for life, under the settlement created by the will, within the meaning of the Settled Land Act, 1882:—*Held*, that the life estate given by the will to the daughter was not gone, but only suspended; but there was an implied trust for payment of the debts and claims by the trustees; that when those were paid the daughter would come in again by virtue of her suspended estate, and be equitable tenant for life; and that as the implied trust for payment of debts was one which might be properly carried out by accumulating the rents and profits, if it were necessary from time to time so to do, it was substantially a "trust for accumulation of income" for payment of debts within sect. 58, sub-sect. I. cl. vi., and the daughter was therefore a person entitled to exercise the powers of a tenant for life. WILLIAMS *v.* JENKINS - 700

SHARES—Certificate of—Deposits—Blank transfer of shares—Priority - - 610
See COMPANY. 5.

—— Extinguishment of—Reduction of capital
See COMPANY. 4. [495

—— Issued at a discount—Winding-up petition
See COMPANY. 9. [731

—— Transfer of—Refusal to register—Measure of damages - - - - 618
See COMPANY. 6.

SHAREHOLDERS—Meeting of—Mode of voting—Proxies - - - - 603
See COMPANY. 3.

SOLICITOR—*Costs—Charging order—"Property recovered or preserved"—Action for Specific Performance—Mortgage—Priority—Solicitors Act* (23 & 24 *Vict. c.* 127), *s.* 28,] In 1868 D. mortgaged three leasehold houses to the trustees of M.'s settlement. In 1877 M. agreed to sell the three houses to S., the purchase-money being payable by instalments. In 1881 S. mortgaged his interest under the agreement to C. In 1891 the trustees, as mortgagees, advertised the three houses for sale by public auction. At this time S. had paid the instalments for one house, and he brought an action against the trustees and M., claiming specific performance of the agreement, and an injunction to restrain the sale. At the trial, the Defendants were ordered to convey to S., or his mortgagees, the one house in respect of which the purchase-money had been paid, and a set-off of costs was directed.—Pending the trial, C. had refused either to release her charge over the one house in question or to concur in any way with S. in the prosecution of his action.—The solicitors of S. applied for a charging order on the house to secure to them their taxed costs of the action:—*Held*, that they were entitled to the order, and that it had priority over C.'s mortgage. SCHOLEY *v.* PECK - - - 709

2. —— *Costs — Taxation — "Attendances"—"Drawing Documents"—Case for Opinion of Counsel—Discretion of Taxing Master—"Special Reasons"—General Order under Solicitors' Remuneration Act*, 1881, *Sched. II.*] Under Sched. II. to the Solicitors' Remuneration Order the Taxing Master has a discretion in a case, which is not an "ordinary" one, i.e., is more or less difficult than an average case, to increase or to diminish the fee for attendance in that schedule prescribed, according to the circumstances. The discretion must be exercised for "special reasons," but the Taxing Master is not bound to state those reasons until his decision is impeached.—Decision of North, J., affirmed.—*Held*, by North, J. (no appeal on this point), that an attendance of a solicitor or his clerk for a merely formal purpose, such as delivering briefs or papers at counsel's chambers, is not an "attendance" within the meaning of Sched. II., and that the practice of the Taxing Masters to allow a fee of only 3*s.* 4*d.* for such an attendance is correct:—*Held*, also, by North, J. (no appeal on this point), that a case for the opinion of counsel is a "document" within the meaning of Sched. II., and that the practice of the Taxing Masters to allow a fee of only 1*s.* per folio as the ordinary fee for the drawing of such a case is wrong. *In re* MAHON [C. A. 507

3. —— *Costs — Taxation — Mortgage — Solicitor one of the Mortgagees—Sale of Mortgaged Property—Foreclosure Action—Solicitor Mortgagee's Firm acting for Mortgagees,*] *Held*, by Stirling, J., and by the Court of Appeal, that a solicitor mortgagee acting as solicitor for himself and his co-mortgagee cannot charge any profit costs against the mortgagor, either as to proceedings in an action, or business done out of Court.—But *held*, by Stirling, J., that in principle there is nothing to prevent a partner of the solicitor mortgagee from receiving remuneration for his trouble, and in the absence of any agreement that the solicitor mortgagee is not to share in the profits arising from the transaction in question, the proper course is to ascertain what the profit costs are, and then to allow the other partner the same share in them as he is entitled to in the general profits of the partnership business. This was not appealed from.—*In re Donaldson* (27 Ch. D. 544) and *Cradock* v. *Piper* (1 Mac. & G. 664) observed upon. *In re* DOODY. FISHER *v.* DOODY. HIBBERT *v.* LLOYD - - - - C. A. 129

SPECIFIC PERFORMANCE—Covenant in lease to employ servant - - - - 116
See LANDLORD AND TENANT.

STATUTES.

29 Car. 2, c. 3, s. 4—*Statute of Frauds* - 84
See FRAUDS, STATUTE OF.

4 Geo. 2, c. 28, s. 6—*Landlord and Tenant* 166
See LIMITATIONS, STATUTE OF.

6 & 7 Will. 4, c. 32—*Building Societies* 377
See BUILDING SOCIETY. 1.

1 Vict. c. 26, ss. 23, 24—*Wills* - - 214
See WILL. 1.

—— —— s. 24 - - - - - 101
See WILL. 5.

—— —— s. 33 - - - - - - 567
See WILL. 2.

5 & 6 Vict. c. 45, s. 18—*Copyright* - - 218
See COPYRIGHT. 1.

8 & 9 Vict. c. 16, ss. 14, 15, 18, 19, 20—*Companies Clauses* - - - 610
See COMPANY. 5.

STATUTES—*continued.*

8 & 9 Vict. c. 20, ss. 77, 78, 79—*Railway Clauses* - - - - 427
See RAILWAY. 2.

13 & 14 Vict. c. 60, ss. 2, 31, 35—*Trustee Act*
See TRUSTEE ACTS. [403

15 & 16 Vict. c. 55, s. 6—*Trustee Act* - 403
See TRUSTEE ACTS.

16 & 17 Vict. c. 51, ss. 2, 20—*Succession Duty*
See VENDOR AND PURCHASER. 4. [695

16 & 17 Vict. c. 137, ss. 24, 62, 66—*Charitable Trusts* - - - - 178
See CHARITY. 2.

18 & 19 Vict. c. 124, ss. 29, 48—*Charitable Trusts* - - - - 178
See CHARITY. 2.

23 & 24 Vict. c. 127, s. 28—*Solicitors* - 709
See SOLICITOR. 1.

25 & 26 Vict. c. 89, s. 35—*Companies* 618
See COMPANY. 6.

—— —— ss. 51, 129. Sched. I. Table A. 603
See COMPANY. 3.

—— —— s. 79, sub-s. 5 - - - 731
See COMPANY. 9.

—— —— ss. 87, 151 - - - 713
See COMPANY. 11.

—— —— ss. 95, 98, 102 - - - 724
See COMPANY. 8.

—— —— ss. 110, 144 - - - 371
See COMPANY. 12.

30 & 31 Vict. c. 131, s. 9—*Companies* - 495
See COMPANY. 4.

33 & 34 Vict. c. 78, ss. 12, 64—*Tramways*
See TRAMWAY. [309

36 & 37 Vict. c. 66, s. 49—*Judicature Act*
See PRACTICE. 1. [547

37 & 38 Vict. c. 42, ss. 4, 32—*Building Societies* - - - - 398
See BUILDING SOCIETY. 2.

40 & 41 Vict. c. 26, s. 3—*Companies* - 495
See COMPANY. 4.

44 & 45 Vict. c. 12, ss. 27, 41—*Customs and Inland Revenue* - - - 188
See REVENUE.

44 & 45 Vict. c. 41, s. 7, sub-s. 1 (*A.*)—*Conveyancing Act* - - - - 523
See VENDOR AND PURCHASER. 2.

—— —— s. 30 - - - - 214
See WILL. 1.

—— —— s. 43 - - - - 329
See INFANT. 2.

45 & 46 Vict. c. 38, s. 2, sub-ss. 2, 5, 7; s. 58, sub-s. 1—*Settled Land Act* - 700
See SETTLED LAND ACTS. 2.

—— —— s. 22, sub-s. 5; s. 25 - - 153
See SETTLED LAND ACTS. 1.

45 & 46 Vict. c. 45, s. 10—*Bills of Sale* 335
See BILL OF SALE.

46 & 47 Vict. c. 52, s. 27—*Bankruptcy* - 686
See PRACTICE. 4.

46 & 47 Vict. c. 57, s. 32—*Patents, Designs, and Trade Marks* - - - 413
See PATENT.

STATUTES—*continued.*

49 & 50 Vict. c. 27, ss. 2, 3, 6, 13—*Guardianship of Infants* - - - 143
See INFANT. 1.

49 & 50 Vict. c. 33, s. 6—*International Copyright* - - - - - 35
See COPYRIGHT. 2.

50 & 51 Vict. c. 71, s. 36—*Coroners* - 676
See CROWN.

51 & 52 Vict. c. 2, s. 25—*National Debt Conversion* - - - - 293
See NATIONAL DEBT.

51 & 52 Vict. c. 59, s. 8—*Trustees* - 304
See TRUSTEE. 1.

—— —— —— - - - - 590
See TRUSTEE. 2.

—— —— ss. 10, 11 - - - 61
See TENANT FOR LIFE. 2.

52 & 53 Vict. c. 7, s. 5—*Customs and Inland Revenue* - - - - 188
See REVENUE.

53 & 54 Vict. c. 5, ss. 90, 94, 98, 109—*Lunatics*
See LUNATIC. [466

53 & 54 Vict. c. 63, ss. 1, 3—*Companies, Winding-up* - - - - 398
See BUILDING SOCIETY. 2.

—— —— s. 8 - - - - 210
See COMPANY. 10.

—— —— ss. 12, 13 - - - 724
See COMPANY. 8.

53 & 54 Vict. c. 69, s. 13, sub-s. 2, 4; s. 15—*Settled Land Act* - - - 153
See SETTLED LAND ACTS. 1.

54 & 55 Vict. c. 73, s. 9—*Mortmain* - 44
See CHARITY. 1.

55 & 56 Vict. c. 27, s. 1—*Parliamentary Deposits* - - - - 43
See RAILWAY. 1.

—— —— - - - - 309
See TRAMWAY.

STOCKBROKER—Liability of—Foreign principal—Country customer - - 594
See PRINCIPAL AND AGENT.

SUCCESSION DUTY—Charge on property—Sale free from incumbrances - - 695
See VENDOR AND PURCHASER. 4.

SUPPORT—Minerals under canal - - 16
See CANAL.

TAXING MASTER—Discretion of—"Special reasons" - - - - 507
See SOLICITOR. 2.

TENANT FOR LIFE—*Income—Mortgage—Colliery in Possession.*] A testator gave his residue to trustees to convert (with power to postpone conversion) and to pay the income to tenants for life. Part of the testator's estate at his death consisted of a mortgage debt secured on a colliery in his possession; interest was in arrear. After the testator's death his trustees foreclosed. Proceeds of working the colliery come to the hands of a receiver in the foreclosure action were transferred to the credit of an action to administer the testator's estate:—*Held*, that the funds in Court were apportionable between capital and income,

TENANT FOR LIFE—*continued.*
on the principle that so much as would, if invested at the testator's death at 4 per cent. with annual rests, have amounted to the sum transferred at the date of transfer, should be treated as capital and the rest as income. *In re* Godden. Teague *v.* Fox - - - - 292

2. —— *Leaseholds—Renewal—Rent—Repairs—Fines—Residue—Liability—Trustee Act*, 1888 (51 & 52 *Vict. c.* 59), *ss.* 10, 11.] A testator, being possessed of a leasehold house held by him for a term of sixty-one years, renewable every fourteen years on fines for renewal, and under covenants to pay the rent, repair and insure, bequeathed the house to trustees, in trust for his widow for life, with remainder in trust for his son for life, with remainders over; and he bequeathed his residuary estate to his trustees upon trust out of the income to pay all the costs, charges, and expenses of carrying into execution the trusts of his will, and, subject thereto, to hold such residuary estate upon trusts for his children in settled shares:—*Held*, reluctantly following *In re Courtier* (34 Ch. D. 136), that neither tenant for life was under any obligation to pay the rent, repair, or insure, or to pay the fines or expenses of renewal; that the rent and the expenses of repair and insurance, during the respective lives of the tenants for life, were payable out of the income of the residuary estate; and that the fines and expenses of renewal were distributable among the beneficiaries of the house according to their enjoyment, such enjoyment to be ascertained by actuarial valuation.—The object of the Trustee Act, 1888, was merely to remove the then existing liability of trustees, not to alter any law as between tenant for life and remainderman. *In re* Baring. Jeune *v.* Baring - - 61

—— Settled Land Act - - 153, 700
See Settled Land Acts. 1, 2.

THREATS—To take legal proceedings—Patent
See Patent. [413

TITLE DEEDS—Right to—Priority of Mortgages
See Mortgage. 2. [352

TRADE MARK—Foreign photograph—International copyright—Existing rights 35
See Copyright. 2.

TRAMWAY—*Company—Winding-up—Application of Parliamentary Deposit—Costs of Liquidator—Tramways Act*, 1870 (33 & 34 *Vict. c.* 78), *ss.* 12, 64—*Board of Trade Rules, August*, 1886, *r.* 22—*Parliamentary Deposits and Bonds Act*, 1892 (55 & 56 *Vict. c.* 27), *s.* 1.] When a tramway company, which has been authorized to construct tramways by a provisional order of the Board of Trade, made under the Tramways Act, 1870, and afterwards confirmed by an Act of Parliament, has failed to construct the authorized tramways within the time limited for the purpose, and has been ordered to be wound up, the Court has not, under rule 22 of the Board of Trade Rules, 1886 (the terms of which are in substance the same as those of sect. 1, sub-sect. 2 of the Parliamentary Deposits and Bonds Act, 1892), jurisdiction to order the liquidator's general costs of the liquidation to be paid out of the deposit made, in pursuance of sect. 12 of the Tramways

TRAMWAY—*continued.*
Act, 1870, prior to the issue of the provisional order.—The liquidator cannot be allowed out of the deposit any costs beyond those of proceedings taken by him in reference to the application of the deposit. *In re* Colchester Tramways Company - - - - - - 309

TRANSFER — Shares — Blank transfer — Constructive notice - - - 610
See Company. 5.

—— Winding-up proceedings—Building society—City of London Court - - 398
See Building Society. 2.

TREASURE TROVE—Prerogative of Crown 676
See Crown.

TRUSTEE—*Breach of Trust—Statute of Limitations—Account—Trustee Act*, 1888 (51 & 52 *Vict. c.* 59), *s.* 8.] Under the will of a testatrix an infant was entitled to the residue of her estate, which was to be held by the trustees of the will in trust for him, to be paid and transferred to him on his attaining twenty-one. The testatrix died in May, 1875. The infant attained twenty-one in December, 1880. In May, 1892, he took out a summons against the two trustees and executors of the will, claiming an order for the administration of the estate of the testatrix. One of the Defendants did not appear. The other Defendant, who had been the acting trustee and executor, deposed that he had expended the whole of the residue during the Plaintiff's minority in maintaining and educating him. He admitted that he had never rendered any account to the Plaintiff, but said that he had told him during his minority how the fund had been applied. The Plantiff did not allege that the Defendant had been party or privy to any fraud or fraudulent breach of trust, and there was no evidence that the Defendant had converted any part of the trust fund to his own use, or that he retained any part of it:—*Held*, that sect. 8 of the Trustee Act, 1888, applied, and that the summons must be dismissed. But it was dismissed without costs. *In re* Page. Jones *v.* Morgan - 304

2. —— *Breach of Trust—Statute of Limitations—Receipt and Conversion of Trust Money to Use of Trustee—Trustee Act*, 1888 (51 & 52 *Vict. c.* 59), *s.* 8.] The exception in sect. 8, sub-sect. 1, of the Trustee Act, 1888, which prevents a trustee relying on the Statute of Limitations as a defence to an action to recover the proceeds of trust property "received by the trustee and converted to his use," does not, in the absence of fraud, apply where trust funds advanced on mortgage are, with the concurrence of the mortgagor, applied in payment of a debt previously charged on the mortgaged property in favour of a bank in which the trustee is a partner. *In re* Gurney. Mason *v.* Mercer - - - - - 590

3. —— *Liability when Remunerated—Loss of Trust Property by Felony of Servant*] A trustee, although remunerated for his services, is not liable for loss occasioned to the trust estate by the felonious acts of his servant, provided such servant is properly entrusted with the custody of the trust property, and is selected and employed without negligence:—*Semble*, that the liability

TRUSTEE—*continued.*
of a trustee is not increased by the fact of his being remunerated for his services. JOBSON *v.* PALMER - - - - - - 71

—— Costs—Appeal for Costs - - 547
See PRACTICE. 1.

TRUSTEE ACTS—*Practice—New Trustees, Appointment of—Limited Company—Shares not fully paid up—Vesting Order, Form of—"Stock"—"Into the names" of New Trustees—"Any purchaser or purchasers"—Trustee Act*, 1850 (13 & 14 *Vict. c.* 60), *ss.* 2, 31, 35—*Trustee Extension Act*, 1852 (15 & 16 *Vict. c.* 55), *s.* 6.] A vesting order as to stock or shares under sect. 35 of the Trustee Act, 1850, upon the appointment of new trustees by the Court, should vest in the trustees simply "the right to call for a transfer of, and to transfer" the stock or shares, "and to receive the dividends or income thereof." The order should not go on to direct the trustees to transfer "into their names"; and, although the language of sect. 31 is sufficient to authorize the insertion of the words "to any purchaser or purchasers," as in *In re Peacock* (14 Ch. D. 212), they should not be inserted except under special circumstances.—*In re Peacock* considered.—"Stock" in the Trustee Act, 1850, and the Trustee Extension Act, 1852, includes shares in a limited company, whether fully paid up or not. *In re* NEW ZEALAND TRUST AND LOAN COMPANY [C. A. 403

UNDUE INFLUENCE—*Confidential Relationship—Gift inter vivos—Setting aside.*] L., a man of no means, and a member of a religious sect known as Exclusive Brethren, was employed as travelling companion to M., an epileptic subject of large fortune. While so employed he converted M. to his own religious views, and in consequence of such conversion M. left his home, and took up his residence with L., with whom he continued to reside in great seclusion for the last seven years of his life. During this period M., who was in a low and morbid condition, consulted L. on spiritual and temporal matters, allowed him to regulate his diet and his medicine, and placed nearly the whole of his fortune at his disposal. L. endeavoured to suppress all evidence of his monetary dealings with M. The aggregate amount obtained by L. from M. was £140,000:—*Held*, that the money had been obtained by the actual exercise of undue influence under the guise of religion, and ought to be refunded. *Semble*, the money could be recovered also on the ground of confidential relationship. MORLEY *v.* LOUGHNAN - - - 736

VENDOR AND PURCHASER — *Covenants — Building Land—Sale in Lots by Auction—Restrictive Covenants—Retainer of other Lands by Vendor—Unsold Lots—Liability of Vendors to observe Restrictive Covenants—Form of Conveyance to Purchaser.*] Where a vendor puts up building land for sale in lots subject to restrictive covenants, it is a question of fact to be deduced from all the circumstances of the case whether the restrictions are merely matters of agreement between him and his vendees, imposed for his own benefit and protection, or are meant by him and understood by the buyers to be for the common advantage of the several purchasers; and the retainer by the vendor of some part of the property is only an element, though an important one, to be taken into consideration with other circumstances in ascertaining the intention; for though the vendor may not part with his whole estate, there may be circumstances which shew that the intention was that each purchaser should be entitled to enforce the restriction against the vendor himself as well as against purchasers.—A land company put up freehold building sites for sale by auction in lots, subject to particulars and conditions of sale which, in the view of the Court, constituted an invitation to the public to come in and purchase on the footing that the whole of the property offered for sale was to be bound by one general law affecting the character of the buildings to be erected thereon. At the auction some of the lots were sold and some were not, and after the sale the vendors claimed the right to sell the unsold lots free from the restrictive covenants in case they desired to do so:—*Held*, that a purchaser who had bought one of the lots sold at the auction, but had not completed his purchase, was entitled to the benefit of a contract by the vendors implied in the conditions of sale—that the vendors would, as to the lots unsold at the auction, observe stipulations similar to those which the purchasers of those lots, had they been sold, would have been bound to covenant to observe; and *held*, also, that the purchaser was entitled to have such obligations of the vendors expressed in the conveyance to him of his lot.—*Nottingham Patent Brick and Tile Company* v. *Butler* (15 Q. B. D. 261; 16 Q. B. D. 778) discussed and explained. IN RE BIRMINGHAM AND DISTRICT LAND COMPANY AND ALLDAY - - - 342

2. —— *Covenants—Conveyance as "Beneficial Owner"—Implied Covenants for Title—Secret Incumbrances created by Person from whom Vendor purchased—Effect of Vendor's previous Ownership—Conveyancing and Law of Property Act*, 1881 (44 & 45 *Vict. c.* 41), *s.* 7, *sub-s.* 1 (A).] The Defendant granted a lease of land to B. for ninety-nine years, and afterwards B. granted certain sub-leases by way of mortgage. He then, for value, surrendered the term to the Defendant, without disclosing the existence of the sub-leases. By a subsequent deed the Defendant, for value, conveyed the fee simple, "as beneficial owner," to B., under whom the Plaintiff claimed. Some time afterwards the Plaintiff and Defendant discovered the existence of the mortgage sub-leases; and the Plaintiff then brought an action against the Defendant for damages for the breach of the implied covenant contained in his conveyance, as "beneficial owner," to B.:—*Held* (reversing the decision of Romer, J.), that the grant of the lease for ninety-nine years to B., which was still outstanding for the benefit of the mortgage sub-lessees, was an act "done by the Defendant" within the meaning of the implied covenant for right to convey; that the creation of the mortgage sub-leases by B. was an incumbrance "made by a person rightfully

VENDOR AND PURCHASER—*continued.*
claiming through the Defendant," within the meaning of the implied covenants for quiet enjoyment and freedom from incumbrances; and that the Plaintiff was entitled to claim damages against the Defendant for breach of those covenants.—*Held*, also, that although the Defendant would have had a good defence against B. if he had brought an action for breach of the covenant, on the ground of B.'s fraud, he had no such defence against the Plaintiff, who had purchased without notice of the fraud, and was not affected by B.'s disability.—Per Lindley, L.J.: *Semble*, that inasmuch as the Defendant was ignorant of the existence of the sub-leases, his omission to get them in was not in itself an act "omitted" by him within the meaning of the implied covenant for right to convey. DAVID *v.* SABIN [C. A. 523

3. —— *Covenants—Restrictive Covenants—Property sold in Plots—Building Scheme—Representations by Vendor—Plan—Printed Form of Agreement.*] If a vendor prepares a plan of a building estate shewing lots with houses marked on them, and an intending purchaser is shewn that plan, and his agreement with regard to a plot purchased by him happens to be on a printed form with written alterations, the purchaser is not entitled to assume that the whole estate is governed by a building scheme that each plot shall, without variation, be built on strictly in accordance with the indications on the plan, and shall of necessity be governed by the printed portions of the agreement.—V. and S. offered a landed estate, belonging to them, in plots as building sites at fee-farm rents. A plan, prepared originally for the approval of the local sanitary authority, shewed the estate cut up into plots of even size, on each of which the ground plan of one house, and no other building, was delineated.—During negotiations for a conveyance of some of the plots, H. was shewn a tracing of the plan (by reference to which he selected his plots), and was informed by the vendors that the houses were to be of a superior class, and worth at least £800 each, and that on certain plots marked out the erection of stables would also be permitted.—H. signed an agreement to take conveyances of four plots, the principal parts of which agreement were printed; and one of the printed clauses provided that the grantee should not erect on any plot any dwelling-house or building, other than a dwelling-house worth £800 (except a greenhouse of a specified description).—H. erected a dwelling-house of the required value on each of his plots, and took a conveyance (of each plot) by which he covenanted not to alter the external elevation of his buildings, and not to erect any other building except a greenhouse.—V. subsequently acquired the interest of S. in other plots, facing those of H., and erected thereon a billiard-room, conservatory, and stables as adjuncts to his own house; but his conveyance contained no restrictive covenant except that he would not erect any building without the approval of S., which he obtained before proceeding to build:—*Held*, that H. had no cause of action in respect of the erection of the buildings of V. TUCKER *v.* VOWLES - - - 195

VENDOR AND PURCHASER—*continued.*

4. —— *Succession Duty—Sale free from Incumbrances but subject to Leases—Duty in respect of Increased Value on Determination of Leases—Succession Duty Act* (16 & 17 *Vict. c.* 51), *ss.* 2, 20.] Where land subject to leases is sold in fee simple free from incumbrances, and without provision as to succession duty, duty which will become payable in respect of the increased value of the property on the determination of the leases, and of which payment has been postponed under sect. 20 of the Succession Duty Act, must be borne by the vendor. *In re* KIDD & GIBBON'S CONTRACT - - - - - 695

VESTING ORDER—New Trustees - - 403
See TRUSTEE ACTS.

VOLUNTARY WINDING-UP—Costs of liquidation—Priority - - - 371
See COMPANY. 12.

VOTE—Meeting of shareholders—Proxies 603
See COMPANY. 3.

WILL — *Ademption — Specific devise — Subsequent sale of Property and Re-conveyance to Testator by way of Mortgage—Wills Act* (1 *Vict. c.* 26), *ss.* 23, 24—*Conveyancing and Law of Property Act*, 1881 (44 & 45 *Vict. c.* 41), *s.* 30.] A testator, being absolutely entitled to a freehold estate, specifically devised it to H. Afterwards he sold the estate to a purchaser, and on the following day the property was reconveyed to him by way of mortgage for securing part of the purchase-money, which was allowed to remain charged on the estate:—*Held* (reversing the decision of the Vice-Chancellor of the County Palatine of Lancaster), that the sum secured by the mortgage did not pass to the specific devisee.—*Woodhouse* v. *Meredith* (1 Mer. 450) distinguished. *In re* CLOWES - - - - - C.A. 214

2. —— *Lapse—Children as a Class—Issue taking by Substitution—Wills Act* (1 *Vict. c.* 26), *s.* 33.] The rule that sect. 33 of the Wills Act, 1837, does not apply to gifts to children or grandchildren of the testator, as a class, is not affected by the fact that, in the events which happened, the class consisted of but one individual.—Principles of the decisions in *Olney* v. *Bates* (3 Drew. 319), and *Browne* v. *Hammond* (Joh. 210) discussed and applied. *In re* SIR E. HARVEY'S ESTATE. HARVEY *v.* GILLOW - - 567

3. —— *Remoteness—Rule against Perpetuities—Invalid Power of Appointment—Validity of Limitations in Default of Appointment.*] Limitations depending or expectant upon a prior limitation which is void for remoteness are themselves invalid; but limitations in default of appointment under a power which is void for remoteness are not necessarily invalid unless they are themselves obnoxious to the rule against perpetuities. *In re* ABBOTT. PEACOCK *v.* FRIGOUT - - 54

4. —— *Residuary Gift—Trust for Conversion—Tenant for Life and Remainderman—Property retained and managed at a Loss—Apportionment of Annual Losses or Profits between Capital and Income—Form of Order.*] A testator directed that the residue of his estate should be converted on a given day, or as soon after as conveniently

WILL—*continued.*
might be, and that a share should be held upon trust for one for life with remainders over. When the day arrived, it appeared that a leasehold property forming part of the residue could not be advantageously sold, and that it would be for the benefit of all persons interested that it should be retained by the trustees of the will and managed by them, although at a probable annual loss:—*Held*, that the annual loss or profit (if any) ought to be apportioned between capital and income by calculating the sum which, put out at interest at 4 per cent. per annum on the given day and accumulating at compound interest at the like rate with yearly rests, would, together with such interest and accumulations, after deducting income tax, be equivalent at the end of each year to the amount of the loss or profit sustained or made during that year, and then charging the sum so ascertained against, or crediting it to, capital, and charging the rest of the loss against, or crediting the rest of the profit to, income.—Form of order applying the principle of *In re Earl of Chesterfield's Trusts* (24 Ch. D. 643) and *Beavan* v. *Beavan* (24 Ch. D. 649, n.) to such a case. *In re* HENGLER. FROWDE *v.* HENGLER **586**

5. —— *Speaking from Death—Devise of House and Land "now in my own occupation"—Land subsequently acquired by Testator and occupied by him with the House—Subsequent Codicil confirming Will—Wills Act* (1 *Vict. c.* 26), *s.* 24—*Mortgage of subsequently-acquired Land by Testator's Heir—Sale by Mortgagee—Right of Beneficiaries under Will to follow Purchase-money.*] A testator by his will made in April, 1873, devised a freehold cottage with all the land thereto belonging, described as "now in my own occupation," to two trustees upon trust for his wife during her life and after her death for his children, who were five in number, in equal shares. In September, 1873, the testator purchased two fields adjoining the cottage and occupied them with the cottage till his death. In 1877 he made a codicil by which he substituted his wife and his two sons as trustees and executors of his will, and confirmed his will in other respects. The testator died soon after the execution of the codicil, and the will and codicil were proved by his widow and one of his sons, who was his heir-at-law. In 1885 a deed was executed by the widow and the heir-at-law by which, in consideration of £75 expressed to have been advanced to the widow and the heir-at-law, the heir-at-law "as beneficial owner" conveyed the two fields purchased by the testator in 1873 to Chapman, a solicitor, in fee by way of mortgage. Chapman had notice of the contents of the will and codicil, but was advised that the two fields did not pass by them, but descended to the heir-at-law. In 1890 Chapman, under his power of sale as mortgagee, sold the two fields for £300 freed from the mortgage. An action having been brought by the testator's three daughters against the heir-at-law and Chapman —*Held* (affirming the decision of North, J.) (1.) that on the true construction of the will and codicil the two fields passed to the trustees with the cottage; (2.) that the Plaintiffs had a right to adopt the sale and to follow the purchase-money in the hands of Chapman; but that Chapman was entitled to retain his costs of the sale as mortgagee, and any part of the mortgage money which he could shew to have been advanced for the purposes of the trust estate. *In re* CHAMPION. DUDLEY *v.* CHAMPION **C. A. 101**

—— Leaseholds—Gifts to successive tenants for life—Fines for renewal - - **61**
See TENANT FOR LIFE. 2.

WINDING-UP.
See Cases under COMPANY.

—— Building society - - - **391**
See BUILDING SOCIETY. 2.

—— Tramway Company - - - **308**
See TRAMWAY.

WORDS—"Now in my occupation" - **101**
See WILL. 5.

—— "Stock" - - - - - **408**
See TRUSTEE ACTS.

BIBL. LONDIN. UNIV.

LONDON: PRINTED BY WILLIAM CLOWES AND SONS, LIMITED, STAMFORD STREET AND CHARING CROSS.

13 JUN 1963